TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 132.

THE ÆTNA LIFE-INSURANCE COMPANY OF HARTFORD, PLAINTIFF IN ERROR,

vs.

DAVID FRANCE AND LUCETTA T. FRANCE, HIS WIFE, TO USE OF SAMUEL B. SELVAGE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JANUARY 12, 1874.

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1 In the circuit court of the United States for the eastern district of Pennsylvania, of October sessions, 1872, No. 6.

Pleas before the honorable the judges of the said court.

It is thus contained:

Be it remembered that, on the fourth day of November, A. D. 1872, Samuel C. Perkins, esquire, one of the attorneys and counsellors of the said court, appears in open court and presents a certified copy of the record and proceedings of the district court for the city and county of Philadelphia, in a certain cause therein lately depending, wherein David France and Lucetta T. France, his wife, in right of the said Lucetta and to her use, to the use of Samuel B. Selvage, are plaintiffs, and The Ætna Life-Insurance Company of Hartford, Connecticut, is defendant, the said record and proceedings being certified in accordance with the act of Congress in such case made and provided, and the same
2 being read and filed, is in the words and figures following, to wit:

[L. S.] STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

In the district court for the city and county of Philadelphia, it is contained of record as follows, to wit:

Sharpless.
S. C. Perkins, Oct. 12, '72.

DAVID FRANCE AND LUCETTA T. FRANCE, HIS wife, in right of the said Lucetta and to her use, to the use of Samuel B. Selvage,
vs.
THE ÆTNA LIFE-INSURANCE COMPANY OF Hartford, Connecticut.
} Of September term, 1872. No. 1378.

Sums. Case. Exit Oct. 4, 1872. Ret. 1 noon Oct., 1872. "Served."

3 Oct. 12, 1872.—Rule to remove suit to circuit court of U. S. Proceedings to stay. Eo die. Petition of defendants filed. Oct. 19, 1872.—Rule absolute.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

[L. S.] The Commonwealth of Pennsylvania to the sheriff of Philadelphia County, greeting:

We command you that you summon The Ætna Life-Insurance Company of Hartford, Connecticut, late of your county, so that it be and appear before our judges at Philadelphia, at our district court for the city and county of Philadelphia, to be holden at Philadelphia, in and for the said city and county of Philadelphia, the first Monday of October inst., there to answer David France and Lucetta T. France his wife, in right of the said Lucetta and to her use, to the use of Samuel B. Selvage, of a plea of trespass on the case, &c.

And have you then there this writ.

Witness the honorable J. J. Clark Hare, president of our said court

4 at Philadelphia, the 4th day of October, in the year of our Lord one thousand and eight hundred and seventy-two.

B. E. FLETCHER,
Pro Prothonotary.

(Endorsed :) 1378. Sept. T., 1872. David France et ux., &c., vs. The Ætna Life-Insurance Company of Hartford, Connecticut, C. H. Brush, agent & manager, No. 121 So. 4th st. Summons case. Sharpless.

Served the Ætna Life-Insurance Company, of Hartford, Connecticut, by giving a true and attested copy of the within writ to C. H. Brush, agt. of said company, and making known to him the contents thereof, Oct. 5, 1872.

So answers

JAMES V. STOKES,
Depy. Shff.
WM. R. LEEDS, *Sheriff.*

5 DAVID FRANCE AND LUCETTA T. France, his wife, in right of the said Lucetta and to her use, to the use of Samuel B. Selvage,
v.
THE ÆTNA LIFE-INSURANCE COMPANY OF Hartford, Connecticut.
} D. C. Sept. 1, 1873. No. 1378.

To the honorable the judges of the district court for the city and county of Philadelphia :

The petition of the Ætna Life-Insurance Company of Hartford, Connecticut, respectfully sheweth :

That the above action was commenced against petitioners in this court by summons issued October 4, 1872, returnable to first Monday of October instant, and served upon the agent of the petitioners at his office in this city.

That the petitioners are, and were at the time of the issuing of the summons in the above case, a corporation created by the laws of the State of Connecticut, and as such corporation a citizen of said State of Connecticut, and have their principal place of business in the city of Hartford, and State of Connecticut aforesaid.

6 That the said David France and Lucetta T. France, the plaintiffs in the above action, are and were at the time of the issuing of the writ in said action, citizens of the State of Pennsylvania.

That the matter in controversy in said action exceeds the sum of five hundred dollars, ($500,) exclusive of costs. Said action is brought upon a policy of insurance not under seal, on the life of one Andrew Chew, for the sum of ten thousand dollars, ($10, 000.) That petitioners are desirous of removing the said cause into the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, and of and for security to this honorable court for their entering in the said circuit court of Pennsylvania, on the first day of the next session thereof, copies of said process against them, and also for their appearing therein according to the provisions of the act of Congress in such case made and provided.

Your petitioners further pray this honorable court to accept the said security, and to remove the said cause for trial into the next circuit

court *for trial into the next circuit court* of the United States to be held in and for the eastern district of Pennsylvania.

THOMAS O. ENDERS,
President.

7 STATE OF CONNECTICUT,
Hartford City, ss:

J. L. English, being duly sworn according to law, says that he is the secretary of the said Ætna Life-Insurance Company of Hartford, Connecticut, the defendants above named in the above-entitled action, and that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief, and that the matter in controversy in the above-entitled cause exceeds in value five hundred (500) dollars exclusive of costs.

J. L. ENGLISH.

Sworn to and subscribed this tenth day of October, A. D. 1872, before me,

[L. S.] EDWARD GOODMAN,
Commissioner of Deeds for the State of Pennsylvania.

Know all men by these presents that we the Ætna Life-Insurance Company, a body politic and corporate in the law, created by the laws of the State of Connecticut, and having its principal place
8 of business in the city of Hartford, and State of Connecticut aforesaid, and C. H. Brush, of the city of Philadelphia, and State of Pennsylvania, agent, are held and firmly bound unto David France of Pennsylvania, in the sum of five hundred (500) dollars, lawful money of the United States of America, to be paid to the said David France and Lucetta F., his wife, their executors, administrators, or assigns, to the use of Samuel B. Selvage, his executors, administrators, or assigns, to which *judgment* well and truly to be paid, we do bind ourselves, our successors, executors, and administrators jointly and severally firmly by these presents, sealed with the corporate seal of the said Ætna Life-Insurance Company, affixed by their president and attested by their secretary, and sealed with the seal of the said C. H. Brush, dated the eleventh day of October, A. D. 1872.

Whereas, on the fourth day of October, 1872, a certain writ of process called a summons case was issued out of the district court for the city and county of Philadelphia, to September term, 1872, No. 1378, at the suit of David France and Lucetta France, his wife, in right of the said Lucetta and to her use, to the use of *Ætna Life-Insurance Company;*

And whereas the said Ætna Life-Insurance Company, the de-
9 fendant in said action mentioned, had petitioned the said district court to remove the said cause into the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit, according to the provisions of the act of Congress in such case made and provided:

Now the condition of this obligation is such, that if the said Ætna Life-Insurance Company shall enter into the said circuit court of the United States for the eastern district of Pennsylvania, on the first Monday of April, A. D. 1873, copies of the said process against them hereinbefore mentioned, and shall appear to said action in the said circuit court, according to the provisions of the act of Congress in such case,

made and provided, then this obligation shall be void; or else shall be and remain in full force and virtue.

{ SEAL OF THE ÆTNA L. I. CO. }

THOMAS O. ENDERS,
President.

Attest:

C. H. BRUSH, *Agent.* [SEAL.]
J. L. ENGLISH, *Secretary.*
C. H. BRUSH. [SEAL.]

Sealed & delivered in presence of—
EDWARD GOODMAN.
JOHN G. KEYSER.
HENRY D. DIDIER.
EDWARD GOODMAN,
To signature of C. H. Brush.
HARRY SNYDER.

10 STATE OF CONNECTICUT,
City of Hartford, ss:

Be it remembered that, on this tenth day of October, A. D. 1872, before me the undersigned, a commissioner, resident in said city and State, duly commissioned and qualified by the executive authority, and under the laws of the State of Pennsylvania to take acknowledgments and proof of deeds and other writings to be used or recorded therein, came J. L. English, who is known to me to be the same person whose name is signed to the foregoing instrument of writing, in attestation of the corporate seal affixed thereto, and who, being duly sworn, did depose and say that he was present and did see Thomas O. Enders, president of the Ætna Life-Insurance Company, sign the within and foregoing instrument of writing, and affix thereto the common and corporate seal of the said Ætna Life-Insurance Company, which is the same seal now affixed thereto; and that the said instrument of writing was executed and delivered by the said Thomas O. Enders, as president of the said corporation, as and for their act and deed made by order and authority of the said corporation, and that the signatures of the said Thomas O. Enders, as president, and of this deponent respectively.

J. L. ENGLISH.

11 Sworn to and subscribed this fourth day of October, A. D. 1872, before me,

[L. S.] EDWARD GOODMAN,
Commissioner of Deeds for the State of Pennsylvania, in Hartford, Conn.

DAVID FRANCE AND LUCETTA F. FRANCE, HIS wife, in right of the said Lucetta and to her use, to the use of Samuel B. Selvage,
v.
THE ÆTNA LIFE-INSURANCE COMPANY OF Hartford, Connecticut.
} D. C. Sept. 1872. No. 1378.

And now, to wit, October 12, 1872, Samuel C. Perkins presents an order for his appearance as attorney for defendant, together with the petition, affidavit, and bond of the defendant, for the removal of the above case to the circuit court of the United States for the eastern district of

Pennsylvania, and it is ordered that the same be filed, and notice given to the plaintiff's attorney that the same will be heard on Saturday
12 next, the 19th inst., all proceedings to stay in the meantime.

(Endorsed:) 1378. Sept., 1872. France vs. Ætna Life-Ins. Co. D C. Petition, bond, and affidavit for removal of cause to C. C. U. S., & order of court. Filed Oct. 12, 1872.

I certify the within and foregoing to be a true and correct copy of the whole record of the case therein stated, as the same remains in the office of the prothonotary of the district court for the city and county of Philadelphia.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, this 30th day of October, A. D. 1872.

[L. S.] W. H. BEUCKERT,
Pro Prothy.

13 And afterwards, to wit, on the 21st day of February, 1873- Nathan H. Sharpless, esquire, another of the attorneys and counsellors of the said court, appears and presents the declaration of the plaintiffs aforesaid, and the same being read and filed, is in the words following, to wit:

In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit.

EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

The Ætna Life-Insurance Company of Har'ford, Connecticut, a body-corporate in the law, chartered by and under the laws of the State of Connecticut, and having its principal place of business in said State of Connecticut, was summoned into the district court for the city and county of Philadelphia, at the district aforesaid, to answer David France and Lucetta T. France, his wife, suing in right of the said Lucetta and to her use, to the use of one Samuel B. Selvage, of a plea of trespass on the case upon promises, whereupon the said com-
14 pany defendant duly removed the said suit into this court under the provisions of the act of Congress in such case made and provided.

And thereupon the said plaintiffs, by Nathan H. Sharpless, their attorney, complain:

For that whereas the said plaintiff Lucetta, heretofore, to wit, on the twelfth day of July, A. D. eighteen hundred and sixty-five, (1865,) at the city and county aforesaid, caused to be made a certain policy of insurance subscribed by the president and secretary of the said company defendant; and thereafter, to wit, on the seventeenth day of the month and year aforesaid, at, &c., aforesaid, countersigned by C. H. Brush, the agent of the defendant at Philadelphia, and delivered to the said plaintiff Lucetta, to wit, at, &c., aforesaid, which said policy of insurance the said plaintiffs now show to the court here, and which is in the words and figures following, viz:

No. 11211]

Participating policy.

ÆTNA LIFE-INSURANCE COMPANY, HARTFORD, CONNECTICUT.

This policy of insurance witnesseth that the Ætna Life-Insurance

Annual premium, $243.50. Company in consideration of the sum of two hundred and forty-three dollars and fifty cents, to them in hand paid by
15 Andrew J. Chew, for the benefit of Lucetta T. France, his sister, and of the annual premium of two hundred and forty-three dollars and fifty cents, to be paid to said company on or before the twelfth
Note for one-half each year. day of July in every year during the continuance of this policy, do assure the life of Andrew J. Chew, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, in the amount of ten thousand dollars for the term of his life. And the said
Term—life. company do hereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said assured, her
Sum insured, $10,000. executors, administrators or assigns, within ninety days after due notice and proof of the death of the said Andrew J. Chew; and in either case all indebtedness of the party to the company shall be deducted from the sum insured. If any notes given by the said Andrew J. Chew for any portion of the cash part of premium on the within policy, for any current year, shall mature and not be paid, the policy shall become void from that date, and all payments of premium thereon forfeited to said company.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the
16 assured upon these express conditions, that in case the said Andrew J. Chew shall die upon the seas, or shall, without the consent of this company previously obtained and endorsed upon this policy, pass beyond the settled limits of the United States, (excepting into the settled limits of the British Provinces of the two Canadas, Nova Scotia, or New Brunswick,) or shall, without such previous consent thus endorsed, visit those parts of the United States which lie south of the thirty-sixth degree of north latitude between the first of June and the first of November, or shall, without such previous consent thus endorsed, pass to or west of the Rocky Mountains, or shall, without such previous consent thus endorsed, enter into any military or naval service whatsoever, (the militia not in actual service excepted,) or shall, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as conductor or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, or in case he shall become so far intemperate as to impair his health seriously and permanently, or induce delirium tremens, or shall die
17 by his own hand, or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the States, or of the United States, or of any government where he may be, this policy shall be void, null, and of no effect.

And it is also understood and agreed to be the true intent and meaning hereof that if the proposal, answers, and declaration made by the said Andrew J. Chew, and bearing date the twelfth day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then, and in such case, this policy shall be null and void, or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.

And it is further agreed that in every case where the policy shall cease,

or be or become void, all payments made thereon shall be forfeited to the said company; and also all profits and dividend credits
18 accruing therefrom.

In witness whereof the said Ætna Life-Insurance Company have, by their president and secretary, signed and executed this contract, in the city of Hartford, this 12th day of July, 1865, but the same shall not be valid until countersigned by C. H. Brush, agent at Philadelphia.

(Signed) E. A. BULKELEY,
President.

(Signed) T. O. ENDERS,
Secretary.

[U. S. internal-revenue stamp, $1.00, cancelled.]

Countersigned at Philadelphia this seventeenth day of July, 1865.
(Signed) C. H. BRUSH, *Agent.*

And the said plaintiffs aver that the aforesaid policy of insurance was made by the said company defendant, and delivered to the said plaintiff Lucetta, as aforesaid, in consideration of the payment to the said company defendant, by the said Andrew J. Chew, therefor, of the sum of two hundred and forty-three dollars and fifty cents, to them in hand paid by the said Andrew J. Chew, at or before the time of the making of the said policy of insurance, and also in consideration of the
19 annual premium of two hundred and forty-three dollars and fifty cents, to be paid to the said company defendant, by the said Andrew J. Chew, on or before the twelfth day of July in every year, in accordance with the rules and regulations of the said company defendant in that behalf, during the continuance of the said policy; and the said plaintiffs further aver that the said Andrew J. Chew did, during the continuance of said policy and until the time of his death, as hereinafter mentioned, in accordance with the said rules and regulations of the said company defendant, in that behalf, pay to the said company defendant, on or before the twelfth day of July in every year, the annual premium of two hundred and forty-three dollars and fifty cents aforesaid, as for and on account of the said annual premiums mentioned in the policy of insurance aforesaid.

And the said plaintiffs further aver, that at the time of the making of the said policy of insurance, and during the continuance thereof, and also at the time of the death of the said Andrew J. Chew, she, the said plaintiff Lucetta, was interested in the life of the said Andrew J. Chew to a large amount, to wit, to the amount of all the monies insured to her as aforesaid upon the life of the said Andrew J. Chew, to
20 wit, the said sum of ten thousand dollars. And the said plaintiffs further aver that, afterwards, to wit, on the twenty-fifth day of May, A. D. eighteen hundred and seventy-two, at the city of Philadelphia, to wit, at, &c., aforesaid, the said Andrew J. Chew died; and that afterwards, to wit, on the tenth day of June, in the year last aforesaid, due notice and proof of the death of the said Andrew J. Chew was given and made to the said company defendant, to wit, at, &c., aforesaid. And the said plaintiffs further aver that the said Andrew J. Chew did not die upon the seas, nor did he, after the making of the said policy of insurance, pass beyond the settled limits of the United States; nor did he visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November; nor did he pass to or west of the Rocky Mountains;

nor did he enter into any military or naval service whatsoever; nor was he personally employed as an engineer or fireman in charge of a steam-engine, or as conductor or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder; nor did he become so far intemperate
21 as to impare his health seriously and permanently, or so as to induce delirium tremens; nor did he die by his own hand, or in *or in* consequence of a duel, or by the hands of justice, or in the known violation of any law of any government, country, or place.

And the said plaintiffs further aver that the proposal, answers, and declaration made by the said Andrew J. Chew, bearing date the twelfth day of July, 1865, and, by the terms thereof, made part and parcel of the aforesaid policy of insurance, were not in any respect false or fraudulent, to wit, at, &c., aforesaid, which said proposal, answers, and declaration the said plaintiffs are not able herein to set forth, for the reason that the same are in the possession of the company defendant.

Of all which said several premises the said company defendant afterwards, to wit, on the tenth day of June, A. D. eighteen hundred and seventy-two, at, &c., aforesaid, had notice. And the said plaintiffs further aver that, although the period of ninety days after due notice and proof of the death of the said Andrew J. Chew had been given and made to the said company defendant, had before the commencement of this suit long elapsed, and although the said Andrew J. Chew was not at the time of his death, and the said plaintiff Lucetta
22 is not indebted to the said company defendant, yet the said company defendant (although often requested so to do) have hitherto wholly neglected and refused, and still neglect and refuse, to pay to the said plaintiff Lucetta the said sum of ten thousand dollars in the said policy of insurance specified, or any part thereof, to wit, at, &c., aforesaid.

And whereas, also, the said company defendant afterwards, to wit, on the twelfth day of July, A. D. eighteen hundred and sixty-five, at, &c., aforesaid, in consideration of the sum of two hundred and forty-three dollars and fifty cents paid in hand to them by the said Andrew J. Chew, at the time of their then and there making the policy of insurance hereinafter mentioned, and also for and in consideration of the promise of the said Andrew J. Chew, then and there made to the company defendant, to pay them therefor an annual premium of two hundred and forty-three dollars and fifty cents, on or before the twelfth day of July in every year during the continuance of the said policy; that is to say, during the life-time of the said Andrew J. Chew, made and executed a certain other policy of insurance, which said last-
23 mentioned policy afterwards, to wit, on the seventeenth day of the month and year last aforesaid, at, &c., aforesaid, was countersigned by one C. H. Brush, the agent at Philadelphia of the said company defendant, and lawfully delivered to the plaintiff Lucetta, which last-mentioned policy of insurance is in the like identical words and figures as that set forth in the first count of this declaration, beginning with the words "participating policy," and ending with the words "countersigned at Philadelphia this seventeenth day of July, 1865.

(Signed) "C. H. BRUSH, *Agent.*"

And the said plaintiffs aver that the said Andrew J. Chew did, afterwards, during the continuance of the said last-mentioned policy of insurance, that is to say, during the life-time of the said Andrew J. Chew, duly pay to the said company defendant, on or before the twelfth day

of July, in any year, the annual premium of two hundred and forty-three dollars and fifty cents in the said last-mentioned policy of insurance mentioned.

The said plaintiffs further aver that afterwards, to wit, on the twenty-fifth day of May, A. D. eighteen hundred and seventy-two, at the city of Philadelphia, to wit, at, &c., aforesaid, the said Andrew J.
24 Chew died; and that afterwards, to wit, on the tenth day of June, in the year last aforesaid, due notice and proof of the death of the said Andrew J. Chew was given and made to the said company defendant; and the said plaintiffs further aver that the said Andrew J. Chew did not, in his life-time, violate any of the conditions or stipulations of the said last-mentioned policy of insurance, nor did he die in any of the ways in which it was provided in the said policy that the same should thereupon become void and of no effect; and the said plaintiffs further say that, although the period of ninety days after due notice and proof of the death of the said Andrew J. Chew had been given and made to the company defendant as aforesaid had before the commencement of this suit long elapsed, yet the said company defendant (although often requested so to do) have hitherto wholly neglected and refused, and do still neglect and refuse, to pay to the said plaintiff Lucetta the said sum of ten thousand dollars in the said last-mentioned policy specified, or any part thereof, to wit, at, &c., aforesaid.

And whereas, also, the said company defendant afterwards, to wit, on the first day of August, A. D. eighteen hundred and seventy-
25 two, at, &c., aforesaid, was indebted to the said plaintiff Lucetta in a certain other large sum of money, to wit, the sum of ten thousand dollars, for so much money then and there found to be due and owing the said plaintiff Lucetta, by the said company defendant, upon an account then and there stated between them; and, being so indebted in consideration thereof, the said company defendant then and there promised the said plaintiff Lucetta to pay her the said last-mentioned sum of money on request.

And whereas, also, the said company defendant afterwards, to wit, on the day and year last aforesaid, at, &c., aforesaid, was indebted to the said plaintiff Lucetta in a certain other large sum of money, to wit, the sum of ten thousand dollars, for so much money before that time had and received by the said company defendant, to and for the use of the said plaintiff Lucetta; and, being so indebted, the said company defendant, in consideration thereof, then and there promised the said plaintiff Lucetta to pay her the said last-mentioned sum of money on request.

And whereas, also, the said company defendant afterwards, to wit, on the day and year last aforesaid, at, &c., aforesaid, was in-
26 debted to the said plaintiff Lucetta in a certain other large sum of money, to wit, the sum of ten thousand dollars, for the forbearance of divers large sums of money before that time due and owing from the said company defendant to the said plaintiff Lucetta, and at the said company defendant's request, and being so indebted, the said company defendant, in consideration thereof, then and there promised the said plaintiff Lucetta to pay her the said last-mentioned sum of money on request.

Yet the said company defendant (although often requested so to do) hath not as yet paid all or either of the said sums of money, nor any part thereof, to the said plaintiff Lucetta, but have hitherto wholly neglected and refused, and still neglect and refuse, so to do, to the

damage of the said plaintiff Lucetta twenty thousand dollars; and therefore the said plaintiffs bring their suit, &c.

NATHAN H. SHARPLESS,
Plaintiff's Atty.

(Endorsed:) Enter rule on the defendant to plead in the above case in eight days, or judgment sec. reg. Sharpless, plffs.' atty. Feb. 21, 1873. To clerk C. C. U. S., E. D. Pa.

27 And afterwards, to wit, on the thirteenth day of March, 1873, the defendants aforesaid, by their attorney aforesaid, present their pleas, which are filed in the words following, to wit:

C. C. U. S., E. D. of Pa. Oct. sess., 1872.

FRANCE ET UX., &C., TO USE OF SAMUEL B. Selvage, *vs.* THE ÆTNA LIFE-INSURANCE CO. OF HARTFORD, Conn. } No. 6.

The defendants, by Samuel C. Perkins, their attorney, plead—

1. Set off.

2. And for a further plea in this behalf, the defendants, as to the first count of the declaration, say that the said plaintiff Lucetta was not interested in the life of the said Andrew J. Chew in manner and form as the plaintiff hath alleged in that behalf; and of this the defendants put themselves upon the country, &c.

3. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policies of insurance in said counts mentioned were obtained from the defendants by
28 the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants; and by the misrepresentation of the plaintiff Lucetta, by her agent, the said Andrew J. Chew, and others in collusion with her: Wherefore the defendants say that the policies of insurance in said counts mentioned were and are void in law; and this the defendants are ready to verify, &c.

4. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policies of insurance in said counts mentioned were obtained from the defendants by the fraud, falsehood, and misrepresentation of the plaintiff Lucetta, by her agent, the said Andrew J. Chew, and others in collusion with her, to wit, as to the true and correct age of the said Andrew J. Chew, and as to the diseases or injuries with which the said Andrew J. Chew had been afflicted, and by the fraudulent suppression, concealment, and withholding from the defendants by the plaintiff Lucetta, by her agent, the said Andrew J. Chew, and others in collusion with her, of certain material information in regard to the party whose life was to be insured, to wit, the said Andrew J. Chew, and then affecting the risk, and which
29 before and at the time of the issuing of said policies were known to the plaintiff, and with which the defendant ought then to have been made acquainted, to wit, that the said Andrew J. Chew was thirty-six years of age, and that the said Andrew J. Chew had been ruptured: Wherefor' the defendants say that the said policies of insurance in said counts mentioned were and are void in law; and this the defendants are ready to verify, &c.

5. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in said counts mentioned were obtained from the defendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the plaintiff Lucetta: Wherefore the defendants say that the said policies of insurance in the said counts mentioned were and are void in law; and this the defendants are ready to verify, &c.

6. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in said counts mentioned were obtained from the de-
30 fendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the said Andrew J. Chew: Wherefore the defendants say that the said policies of insurance in the said counts mentioned were and are void in law; and this the defendants are ready to verify, &c.

7. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policies of insurance in said counts mentioned were obtained from the defendants by the fraud, falsehood, and misrepresentation of the plaintiff, the said Lucetta, to wit, as to the true and correct age of the said Andrew J. Chew and as to the diseases or injuries with which the said Andrew J. Chew had been afflicted, and by the fraudulent suppression, concealment, and withholding from the defendant, by the plaintiff, the said Lucetta, of certain material information in regard to the party whose life was to be insured, to wit, the said Andrew J. Chew, and then affecting the risk, and which before and at the time of the issuing of said policies were known to the plaintiff Lucetta, and with which the defendants ought then to have been made acquainted, to wit, that the said Andrew
31 J. Chew was thirty-six years of age and that the said Andrew J. Chew had been ruptured: Wherefore the defendants say that the said policies of insurance in said counts mentioned were and are void in law; and this the defendants are ready to verify, &c.

8. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in the said counts mentioned were made upon the condition that the statements in the proposal, answers, and declarations by the said Andrew J. Chew, in the said policies of insurance referred to and made part thereof, should form the basis of the contract of insurance, and that any untrue or fraudulent answers should render the said policies null and void. And the defendants say that one of the said answers, being the answer to question four, (4,) to wit, "Place and date of birth of the party whose life is to be insured," (meaning whereby the said Andrew J. Chew.") Answer four, (4,) "Born in 1835, Oct. 28th, Gloster Co., N. Jersey," whereas in truth and in fact the said Andrew J. Chew well knew, to wit, at the time of the making the said answer, that he was not born in the year 1835, but was born several years prior to the said year 1835, to wit, October 28, 1828: Wherefore the defendants say
32 that the said policies of insurance in said counts mentioned were, and are, void in law; and this the defendants are ready to verify, &c.

9. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policies of insurance in the said counts mentioned were made upon the condition that the

statements in the proposal, answers, and declarations by the said Andrew J. Chew in the said policies of insurance referred to and made part thereof, should form the basis of the contract of insurance, and that any untrue or fraudulent answers should render the said policies null and void. And the defendants say that one of the said answers, being the answer to question five, (5,) "Age next birthday," (meaning thereby the age of the said Andrew J. Chew.) Answer five, "Thirty years;" whereas in truth and in fact the said Andrew J. Chew well knew, to wit, at the time of the making the said answer, that his age at his next birthday would not be thirty years, but, on the contrary, would be, to wit, thirty-seven years: Wherefore the defendants say that the said policies of insurance in said counts mentioned were, and are, void in law; and this the defendants are ready to verify, &c.

33 10. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in the said counts mentioned were made upon the condition that the statements in the proposal, answers, and declarations by the said Andrew J. Chew in the said policies of insurance referred to and made part thereof should form the basis of the contract of insurance, and that any untrue or fraudulent answer should render the said policies null and void. And the defendants say that one of the said answers, being the answer to question eleven, (11,) to wit: "Has the party ever had any of the following diseases; if so, how long, and to what extent? Palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, gout, affection of the brain, dropsy, epilepsy, rupture, convulsions, disease of heart, insanity, fistula, fits, palpitation, yellow fever, appoplexy, paralysis. ("The party"

34 thereby meaning the said Andrew J. Chew.) Answer eleven, (11.) "None." Whereas in truth and in fact the said Andrew J. Chew well knew, to wit, at the time of his making the said answer, that he had had one of the diseases or affections mentioned in said question, to wit, rupture: Wherefore the defendants say that the said policies of insurance in the said counts mentioned were, and are, void in law; and this the defendants are ready to verify, &c.

11. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the policies of insurance in the said counts mentioned were made upon the condition that the statements in the proposals, answers, and declarations by the said Andrew J. Chew, in the said policies of insurance referred to and made part thereof, should form the basis of the contract of insurance; and that if the said proposals, answers, and declarations should be found in any respect false or fraudulent, then said policies of insurance should be null and void. And the defendants say that certain answers of the said Andrew J. Chew were, at the time of the making thereof, false and untrue: Wherefore the defendants say that

35 the said policies of insurance in the said counts mentioned were, and are, void in law; and this the defendants are ready to verify, &c.

12. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in the said counts mentioned were made upon the condition that the statements in the proposals, answers, and declarations by the said Andrew J. Chew in the said policies of insurance referred to and made part thereof should form the basis of the contract for insurance; and that if the said proposal, answer, and declarations should be found in any respect false or fraudulent, then said policies of insurance should

be null and void. And the defendants say that one of said answers, being the answer to the question four, (4,) to wit, "Place and date of birth of the party whose life is to be insured," (meaning thereby the said Andrew J. Chew.) Answer four, (4.) "Born in 1835, Oct. 28th, Gloster Co., N. Jersey," and that the said answer was false and untrue; for inasmuch as the said Andrew J. Chew was not born in 1835, but was born, to wit, in the year 1828: Wherefore the defendants say that the said policies of insurance in the said counts mentioned
36 were, and are, void in law; and this the defendants are ready to verify, &c.

13. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in the said counts mentioned were made upon the condition that the statements in the proposal, answers, and declarations by the said Andrew J. Chew in the said policies of insurance referred to and made part thereof, should form the basis of the contract for insurance; and that if the said proposal, answers, and declarations should be found in any respect false or fraudulent, then said policies of insurance should be null and void. And the defendants say that one of said answers, being the answer to the question five, (5,) "Age next birthday?" (meaning thereby the age of the said Andrew J. Chew.) Answer five, (5.) "Thirty years," and that the said answer was false and untrue; for inasmuch as the said Andrew J. Chew's age next birthday would not have been thirty years, but would have been, to wit, thirty-seven years: Wherefore the defendants say the said policies of insurance in the said counts mentioned were, and are, void in law; and this they are ready to verify, &c.

37 14. And for a further plea in this behalf the defendants, as to the first and second counts of the declaration, say that the said policies of insurance in the said counts mentioned were made upon the condition that the statements in the proposal, answers, and declarations by the said Andrew J. Chew in the said policies of insurance referred to and made part thereof, should form the basis of the contract of insurance; and that if the said proposal, answers, and declarations should be found in any respect false or fraudulent, then said policies of insurance should be null and void. And the defendants say that one of the said answers being the answer to the question eleven, (11,) to wit: Has the party ever had any of the following diseases? If so, how long and to what extent? Palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, gout, affection of the brain, dropsy, epilepsy, rupture, convulsions, disease of heart, insanity, fistula, fits, palpi-
38 tation, yellow-fever, apoplexy, paralysis. ("The party" meaning thereby the said Andrew J. Chew.) Answer eleven, (11.) "None," and that the said answer was false and untrue, for inasmuch as the said Andrew J. Chew had had one of the diseases or afflictions mentioned in the said question, to wit, rupture: Wherefore the defendants say that the said policies of insurance in the said counts mentioned were, and are, void in law; and this they are ready to verify, &c.

15. And for a further plea in this behalf, the defendants, as to the second count of the declaration, say that the said plaintiff Lucetta had not at the time of the making or the issuing of the said policy of insurance in the said count mentioned, or at any time afterwards, an interest in the life of the said Andrew J. Chew to support the said policy of insurance; and this the defendants are ready to verify, &c.

16. And for a further plea in this behalf the defendants, as to the third, fourth, and fifth counts of the declaration, plead non assumpserunt.

SAML. C. PERKINS,
Defts.' Atty.

Per H. T. K.

39 And afterwards, to wit, on the 18th day of March, 1873, the plaintiffs aforesaid, by their attorney aforesaid, present their replications to the pleas aforesaid; and the same being filed are in the words following, to wit:

C. C. U. S., E. D. Pa.—Octo. sess. 1872.

FRANCE ET UX. TO THE USE OF SAMUEL B. Selvage, *vs.* THE ÆTNA LIFE-INS. CO. OF HARTFORD, CONN. } No. 6.

And as to the several pleas of the said defendants by them above pleaded, the said plaintiffs, by Nathan H. Sharpless, their attorney, reply:

1. As to the first plea, they say Nil debet.

2. As to the second plea, they say "Similiter & issue."

3. As to the third plea, they say that the said policies of insurance were not obtained from the defendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepre-
40 sentation of the plaintiff Lucetta, by her agent, the said Andrew J. Chew, and others in collusion with her; and this the said plaintiffs pray may be inquired of by the country.

4. As to the fourth plea, they say that the said policies of insurance were not obtained from the defendants by the fraud, falsehood, and misrepresentation of the plaintiff Lucetta, by her agent, the said Andrew J. Chew, and others in collusion with her, as to the true and correct age of the said Andrew J. Chew, and as to the diseases or injuries with which the said Andrew J. Chew had been afflicted, and by the fraudulent suppression, concealment, and withholding from the defendants by the plaintiff Lucetta, by her agent, the said Andrew J. Chew, and others in collusion with her, of certain material information in regard to the said Andrew J. Chew, then affecting the risk, and which before and at the time of the issuing of said policies was known to the said plaintiff, and with which the defendants ought then to have been made acquainted in manner and form, as by the said defendants above in that behalf alleged; and this the said plaintiffs pray may be inquired of by the country.

5. As to the fifth plea, they say that the said policies of insur-
41 ance were not obtained from the defendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the plaintiff Lucetta; and this the said plaintiffs pray may be inquired of by the country.

6. As to the sixth plea, they say that the said policies of insurance were not obtained from the defendants by the fraud, covin, and wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by the misrepresentation of the said Andrew J. Chew; and this the said plaintiffs pray may be inquired of by the country.

7. As to the seventh plea, they say that the said policies of insurance were not obtained from the said defendants by the fraud, falsehood, and misrepresentation of the said plaintiff Lucetta, and by the fraudulent suppression, concealment, and withholding from the defendants by the plaintiff Lucetta of certain material information in regard to the said Andrew J. Chew, then affecting the risk, and which before and
42 at the time of the issuing of said policies were known to the plaintiff Lucetta, and with which the defendants ought then to have been made acquainted in manner and form as by the defendants above in that behalf alleged; and this the said plaintiffs pray may be inquired of by the country.

8. As to the eighth plea, they say that the said Andrew J. Chew, at the time of making the said answer to the said question four, (4,) did not well know that he was not born in the year 1835, but that he was born several years prior to the said year 1835, to wit, October 28th, 1828; and this the said plaintiffs pray may be inquired of by the country.

9. As to the ninth plea, they say that the said Andrew J. Chew, at the time of the making of the said answer to the said question five, (5,) did not well know that his age at his next birth-day would not be thirty years, but, on the contrary, would be, to wit, thirty-seven years; and this the said plaintiffs pray may be inquired of by the country.

10. As to the tenth plea, they say that the said Andrew J. Chew, at the time of making the said answer to said question eleven, (11,) had
43 not had any of the diseases mentioned therein; and this the said plaintiffs pray may be inquired of by the country.

11. As to the eleventh plea, they say that the said answers of the said Andrew J. Chew were not at the time of the making thereof false and untrue; and this the said plaintiffs pray may be inquired of by the country.

12. As to the twelfth plea, they say that the said Andrew J. Chew was not born, to wit, in the year 1828; and this the said plaintiffs pray may be inquired of by the country.

13. As to the thirteenth plea, they say that the age of the said Andrew J. Chew, at his next birth-day, occurring after the time of his making answer to the said question five, (5,) would not have been thirty-seven years; and this the said plaintiffs pray may be inquired of by the country.

14. As to the fourteenth plea, they say that the said Andrew J. Chew, at the time of the making of said answer to said question eleven, (11,) had not had any of the diseases mentioned therein; and this the said plaintiffs pray may be inquired of by the country.

15. As to the fifteenth plea, they say that the said plaintiff
44 Lucetta had, at the time of the making and issuing of the said policy of insurance, and thereafter until the time of his death, an interest in the life of the said Andrew J. Chew to support the said policy of insurance, and this the said plaintiffs pray may be inquired of by the country.

16. As to the sixteenth plea, they say "Similiter and issue."

SHARPLESS,
Plaintiffs' Attorney.

To SAMUEL BELL,
Clerk C. C. U. S., E. D. Pa.

45 Whereupon, afterwards, to wit, on the 12th day of April, A. D. 1873, the defendants aforesaid, by their attorney aforesaid, present and file their demurrer to certain of the replications aforesaid, in the words following, to wit:

C. C. U. S., E. D. of Pa.—Oct. sess., 1872.

FRANCE & WIFE, TO USE, *vs.* ÆTNA LIFE-INS. CO. } No. 6.

And the defendants say that the replications of the plaintiff to the fourth, seventh, tenth, twelfth, thirteenth, and fourteenth pleas of the defendants are not sufficient in law.

And the defendants state and show to the court here the following causes of demurrer to the said replication to the said fourth plea, that is to say, that—

The said replication is double, in this, that the plaintiff hath alleged that the said policies of insurance in the first and second counts of the declaration were not obtained by the fraud, &c., of the plaintiff Lucetta, by her agent, &c., as to the true and correct age of said
46 Andrew J. Chew, and as to the diseases or injuries with which the said Andrew J. Chew had been afflicted, and by the fraudulent suppression, &c., by the plaintiff Lucetta, by her agent, &c., of certain material information in regard to said Andrew J. Chew, then affecting the risk, and which before, &c., was known to the plaintiff, and with which the defendants ought then to have been made acquainted in manner and form as alleged. And also, because the allegations of the plaintiff in the said replication ought to have been laid in the disjunctive and not in the conjunctive, both as respects the two principal branches of the plea, to wit: 1, fraud, falsehood, and misrepresentation; and, 2nd, suppression, concealment, and withholding, and as respects the subdivisions of said principal branches.

And also that said replication tends to raise an immaterial issue, inasmuch as if the defendants should join issue thereon, and should on the trial prove fraud, &c., as to the true and correct age of said Chew, though not as to the diseases or injuries with which said Chew had been afflicted; or should prove suppression, &c., of material information affecting the risk, and which the defendants ought to have been
47 made acquainted, although not as to such material information not being known to the plaintiff, such issue must be found for the plaintiff, although it would be manifest that the policies must be void, and therefore plaintiff would have no right to maintain the action.

2. And the defendants state and show to the court here the following causes of demurrer to the said replication to the said seventh plea, that is to say, that—

The said replication is double in this, that the plaintiff hath alleged the said policies of insurance in the first and second counts of the declaration were not obtained by the fraud, &c., of the said plaintiff Lucetta, and by the fraudulent suppression, &c., by the plaintiff Lucetta of certain material information in regard to the said Andrew J. Chew, then affecting the risk, and which before, &c., was known to the plaintiff, and with which the defendants ought then to have been made acquainted, in manner and form as alleged. And also because the allegations of the plaintiff in the said replication ought to have been laid in the disjunctive and not in the conjunctive, both as respects the two principal branches of plea, to wit: 1, fraud, falsehood, and mis-
48 representation; and, 2d, suppression, concealment, and withholding, and as respects the subdivisions of said principal branches.

And also that the said replication tends to raise an immaterial issue, inasmuch as if the defendants should join issue thereon, and should on

the trial prove that the said policies were obtained by the fraud, &c., of the said plaintiff Lucetta, though not by the fraudulent suppression, &c., by the plaintiff Lucetta, of certain material information in regard to the said Andrew J. Chew, then affecting the risk, &c., or should prove suppression, &c., of material information affecting the risk, and with which the defendants ought to have been made acquainted, although not as to such material information not being known to the plaintiff, such issue must be found for the plaintiff, although it would be manifest that the policies must be void, and therefore plaintiff would have no right to maintain the action.

3. And the defendants state and show to the court here the following causes of demurrer to the said replication to the said tenth plea, that is to say:

Because it is argumentative, the plea aver'ing directly the knowledge of said Chew as to his having had one of the diseases mentioned, to wit, rupture, while the replication denies that he had had any of the diseases mentioned in the plea.

49

And also, because the said replication is too large in its denial, as applying to all the diseases mentioned in said plea.

And also, that said replication tends to raise an immaterial issue, inasmuch as if the defendants should join issue thereon, and should on the trial prove that the said Chew had had the disease particularly mentioned in defendants' tenth plea, to wit, rupture, and that he knew it, though not that he had had all the diseases mentioned in the question set forth in said tenth plea, such issue must be found for the plaintiff, although it would be manifest that the policies must be void, and therefore plaintiff would have no right to maintain the action.

4. And the defendants state and show to the court here the following causes of demurrer to the said replication to the said twelfth plea, that is to say:

Because the said replication does not tender an issue upon the material allegation of the plea, which is the falsity of the answer that said Chew was born in the year 1835.

Also, because said replication tends to raise an immaterial issue, inasmuch as if the defendants should join issue thereon and should, on the trial, the plaintiff prove that the said Chew was born in 1826 or 1829 or 1830, or any other year except 1828, such issue must be found for the plaintiff, although it would be manifest that the policy must be void, and therefore plaintiff would have no right to maintain the action.

50

Also, because it is uncertain and no answer to the plea, inasmuch as it does not state when said Andrew J. Chew was born.

5. And the defendants state and show to the court here the following causes of demurrer to the said replication to the said thirteenth plea that is to say:

Because the said replication does not tender issue upon the material allegation of the plea, which is the falsity of the answer, that the age of the said Andrew J. Chew at his next birth-day would be thirty years.

Also, because said replication tends to raise an immaterial issue, inasmuch as if the defendants should join issue thereon, and on the trial the plaintiff should prove that the age of the said Andrew J. Chew at his next birth-day would have been thirty-two, thirty-four, or thirty-six years, or any other age except thirty-seven years, such issue must be found for the plaintiff, although it would be manifest that the policies must be void, and therefore plaintiff would have no right to maintain the action.

51

Also, because it is uncertain and no answer to the plea, inasmuch as it does not state the age of the said Andrew J. Chew at his next birthday.

6. And the defendants state and show to the court here the following causes of demurrer to the said replication to the fourteenth plea, that is to say:

Because said replication is argumentative, the allegation of the plea being that the answer to the question 11 mentioned in said plea was false and untrue in regard to one special disease set forth in said question, while the replication denies that the said Chew had had any of the diseases mentioned therein.

And also, because said replication is too large in its denial, as applying to all the diseases mentioned in said plea.

7. And the defendants state and show to the court here the following further causes of demurrer to the said replications to the said fourth, seventh, tenth, twelfth, thirteenth, and fourteenth pleas, respectively, that is to say, that the said replications are in other respects un-

52 certain, informal, and insufficient.

SAM'L C. PERKINS,
Deft.'s Atty.

Per H. T. K.

To CL'K C. C. U. S.

And afterwards, to wit, on the day and year last aforesaid, the defendants aforesaid, by their attorney aforesaid, present a rejoinder to certain of the replications aforesaid, in the words following, to wit:

53 C. C. U. S., E. D. of Pa.—Oct. sess., 1872.

FRANCE & WIFE, TO USE,
vs.
ÆTNA LIFE-INS. CO. } No. 6.

And the defendants, as to the replications of the plaintiffs to the first, third, fifth, sixth, eighth, ninth, eleventh, fifteenth, and sixteenth pleas of defendants, and which the plaintiff hath prayed may be inquired of by the country, do the like.

SAM'L C. PERKINS,
Deft.'s Atty.

Per H. T. K.

To CLERK C. C. U. S.

54 And afterwards, to wit, on the 21st day of April, A. D. 1873, the parties aforesaid, by their attorneys aforesaid, present an agreement, which is filed in the words following, to wit:

C. C. U. S., E. D. of Pa.

FRANCE & WIFE, TO USE, &C.,
vs.
ÆTNA LIFE INS. CO. } Oct. sess., Nos. 6 & 7, 1872.

And now, April 19, 1873, after hearing and argument upon defendants' demurrer to the plaintiffs' replications to the 4th, 7th, 10th, 12th, 13th, & 14th pleas of the defendants, by leave of the court first had and obtained, it is agreed that the said pleas mentioned, with the replications

thereto, and the demurrers to said replications, be withdrawn, and that the defendants may file pleas of non-assumpserunt and set-off, with leave, &c., in lieu of the said pleas the replications to which were demurred to; that said pleas be treated and regarded as notice of special matter, and that on the trials the defendants may, under said pleas herein agreed to be filed, give in evidence any facts which might
55 have given under the said 4th, 7th, 10th, 12th, 13th, and 14th pleas, together with any facts which show or tend to show, by reason of fraud or otherwise, that the defendants never undertook and promised as in plaintiffs' declarations alleged.

N. H. SHARPLESS,
Atty. for Pltffs.

April 23d, 1873.

SAM'L C. PERKINS,
Defts.' Atty.

Whereupon the defendants aforesaid, by their attorney aforesaid, present their additional pleas to the declaration aforesaid, in the words following, to wit:

56 C. C. U. S., E. D. of Pa.

FRANCE ET WIFE, TO USE,
vs.
ÆTNA LIFE INS. CO. } Oct. sess., No. 6, 1872.

The defendants, in pursuance of agreement of counsel, and with leave of the court first had and obtained, plead non-assumpserunt and set-off, with leave, &c.

SAM'L C. PERKINS,
Defts. Atty.

Per H. T. K.

To CLK. C. C. U. S.

And thereupon the plaintiffs aforesaid, by their attorney aforesaid, present their replication to the said additional pleas of the said
57 defendants, and the same is filed in the words following, to wit:

C. C. U. S., Oct. sess. 1872.

FRANCE ET UX., TO USE SELVAGE,
v.
THE ÆTNA L. INS. CO. } No. 6.

The plaintiffs reply as to the additional pleas of the said defendants "similiter and issue," and "nil debent."

SHARPLESS,
Pltffs.' Atty.

April 23, 1873.

To CLERK C. C. U. S. E. D. Pa.

Therefore let a jury thereupon come before the said judges at Philadelphia aforesaid, on the fifth day of May next, by whom, &c., who neither, &c., to recognise, &c., because as well, &c., the same day is then and there given to the parties aforesaid.

Afterwards, to wit, at a session of the same court, holden at Philadelphia aforesaid, before the judges aforesaid, on the fifth day of
58 May aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury aforesaid being called, likewise come, to wit: Matthias Myers, John S. Baker, Edwin A. Merrick, Jesse R. Brown, Washington I. Quigley, Isaac W. Roberts, William M. Taylor, Joseph H. Lambert, Richard Wood, William Levy, Amos Bateman, and Benjamin H. Stuckert, who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth of the matter within contained:

59 *Bill of exceptions.*

Be it remembered that at the October sessions, A. D. 1872, came David France and Lucetta T. France his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded the Ætna Life Insurance Company of Hartford, Connecticut, in a certain plea of trespass on the case upon promises in which the said plaintiffs declared (prout narr.) and the said defendants pleaded, (prout pleas and agreement of counsel respecting the same.)

And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city aforesaid, before the honorable John Cadwalader, judge of the district court of the United States for said district, sitting as a circuit judge, on Tuesday, the sixth day of May, A. D. 1873, the aforesaid issue be-
60 tween the said parties came to be tried by a jury of the said district, for that purpose duly empannelled, (prout list of jurors,) at which day came as well the said plaintiff as the said defendant, by their respective attorneys; & the jurors of the jury aforesaid, empannelled to try the said issues, being also called, came, and were then and there, in due manner, chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiffs put in evidence a certain policy of insurance made and executed by the defendants under the hand of their president, attested by their secretary, dated Hartford, Connecticut, July 12, 1865, and countersigned by C. H. Brush, the manager and agent of the defendants at Philadelphia, July 17, 1865, No. 11211, for $10,000, for the term of the life of Andrew J. Chew for the benefit of Mrs. Lucetta T. France, (prout copy of the same hereto annexed, marked Exhibit A.)

And also the application signed by said Andrew J. Chew and Lucetta T. France, dated Philadelphia, July 12, 1865, upon which said policy was issued, (prout copy of the same hereto amend marked Exhibit B.)
61 Also the certificate of the medical examination of said Andrew J. Chew, dated the same day, (prout copy of the same hereto annexed, marked Exhibit C.)

It was admitted that Andrew J. Chew died May 25, 1872, and also that the annual premiums had been regularly paid up to the time of his death.

Also two affidavits dated June 12, 1872, made by Lucetta T. France, and a certificate of death, dated June 11, 1872, sworn to by Dr. Edward F. Guth, (prout copies of the same marked Exhibit D, 1, 2, & 3,) furnished to defendants as proof of loss.

Also a letter from the president of the company defendants to Selvage, dated Hartford, August 23, 1872, with a letter from Selvage to the

company dated August 22, 1872, to which the former was an answer, (prout copies of the same marked Exhibit E, 1 & 2.)

And closed.

The defendants then gave evidence tending to show that said Andrew J. Chew, at the time of the application and issue of the policy
62 would have been thirty-seven (37) or at least thirty-five (35) years old his next birthday, instead of thirty (30) as stated in the application, and that he was born October 28, 1828.

And also evidence tending to show that said Andrew J. Chew had been ruptured from infancy, and so continued up to the date of the application and policy, and up to the time of his death, and that he wore a truss from about the year 1846, at least, up to the time of his death.

Defendants also put in evidence affidavits dated June 11, 1872, of John Dunn, John S. Kenelly, Charles M. Lusenring, and Mary Chew, on the same sheet with & received by the defendants with the 2 affidavits of Mrs. France, (prout copies of the same marked Exhibit F, 1, 2, 3, 4,) but Mrs. France denied all knowledge of these further affidavits.

Plaintiffs, in rebuttal, put in evidence assignments from David France and Lucetta T., his wife, dated 20th April, 1872, to Samuel B. Selvage as collateral security for $2,000, (prout copies of the same marked Exhibit G.)

63 Evidence was given that $2,000 has been loaned by Mr. Selvage to Mrs. France, on the policy as collateral, and he had taken the assignment of the same, and he took the policy into his possession.

After the death of Chew, Mrs. France wished Mr. Selvage to buy the policy from her, and an interview took place between Selvage and Mr. Brush, the agent and manager of the company in Philadelphia, and the evidence on the part of the plaintiff was to the effect that Mr. Brush said the money would be paid when due, and that upon the faith of this he, Selvage, had paid Mrs. France $7,280 for the policy.

They also gave evidence as to the age and the alleged rupture of Chew. Scott, the agent of the company, who took the application, and whom plaintiffs called as a witness, stated that at the time of taking said application in reference to the date of his birth, Chew had some doubt. Scott further said he read the questions over to Chew, and then wrote down his answers; and then read questions and answers all over to him; that he read the list of diseases to him item by item.

64 Defendants, in surrebuttal, called other witnesses as to age, and also Mr. Brush, their agent and manager at Philadelphia, who testified that Scott, before the death, had expressed to him his suspicions in reference to the risk; that at the interview with Selvage he had not told him the money would be paid absolutely; that he might have said that the money would be paid if the claim was a just one.

Defendants also put in evidence note dated June 11, 1872, from Mrs. France to Mr. Brush, (prout copy of same marked Exhibit H,) and letter from Brush to the company defendants, of the same date, (prout copy of same marked Exhibit I.)

And thereupon both sides close; and

Counsel for defendants request the learned judge to charge the jury as follows:

1. If the jury believe that the application for insurance and the policy in question, though nominally in the name of Andrew J. Chew, for the benefit of Lucetta T. France, was, in fact, made and taken out by
65 said Lucetta T. France, for her own benefit, she must show

an insurable interest in the life of said Andrew J. Chew before she can recover; and the mere fact that she was his sister did not give her such insurable interest.

2. If the jury believe that at the time the application for insurance was made, and the policy in question issued, Lucetta T. France was a married woman, and in no way dependant upon Andrew J. Chew for her support, either in whole or in part, the mere fact that she was his sister would not give her an insurable interest in his life.

3. If the jury believe that at the time the application for insurance was made, and the policy in question issued, Andrew J. Chew was not indebted to Lucetta T. France, then she had no insurable interest as a creditor in the life of said Chew, under the policy.

4. That the answers to the questions contained in the application upon which the policy was issued are warranties, and if the jury believe that such answers, or any of them, either in whole or in part,
66 were false and untrue, their verdict must be for the defendants.

5. If the jury believe that the answers to questions Nos 4 and five in the application for insurance, as to the date of birth and age next birthday of said Andrew J. Chew, were false and untrue, the policy issued upon the application is void, and their verdict must be for the defendants.

6. If the jury believe that the answer to question No. 11 in the application for insurance, whether said Andrew J. Chew ever had any of the diseases therein specified, &c., was false and untrue, as to any one of said diseases, the policy issued upon the application is void, and their verdict must be for the defendants.

7. If at the time when the application for insurance was made and the policy issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact and also how long, and to what extent; and if the jury believe that at the time mentioned he was or had been ruptured, his answer "None" to said question No. 11 was untrue and false, and their verdict must be for the
67 defendants.

8. If the jury believe that Selvage did not pay Mrs. France any money on account of policy No. 11211 after his receipt of the letter of August 23, 1872, from the president of the company, the defendants are not estopped by that letter from denying their liability.

9. If the jury believe that Selvage had loaned $2,000 to Mrs. France, upon the security of an assignment, before the death of Chew, of policy No. 11211, as collateral, the defendant' cannot be estopped by anything alleged to have occurred after Chew's death from denying their liability as to that $2,000.

10. If the jury believe that before Selvage paid Mrs. France the $7,280, Brush, the agent of the company, told Selvage that he had no authority to act, that the matter was out of his hands, the defendants are not estopped from denying their liability.

11. That unless the jury believe that Selvage, at the interview with Brush, the agent of the company, fully disclosed to him the purpose and object of his inquiries respecting the policy No. 11211, the
68 defendants are not estopped from denying their liabiliity by anything that Brush might have said.

12. If the jury believe that before Selvage paid Mrs. France the $7,280, Brush, the agent of the company, told Selvage that the policy (or the monies) would be paid if the claim was a just one, the defendants are not estopped from denying their liability.

13. That unless the jury believe there was an absolute and unqualified

assertion by Brush, the agent of the company, that the policy (or the monies) would be paid absolutely and in any event, and that upon the faith of such an assertion alone Selvage paid the $7,280 to Mrs. France, the defendants are not estopped from denying their liability.

And thereupon the judge having read to the jury the first, second, and third points of the defendants' request to charge, said that he could not give the instructions requested; and further said that if Andrew J. Chew was, at the time of the insurance, unmarried and without issue or parent living, the insurance for the benefit of his sister was
69 valid, if the risk insured was truly described in the policy.

The judge having read to the jury the fourth, fifth, sixth, and seventh points of the defendants' requests to charge, and the clause of the policy in the words, "It is also understood and agreed to be the true intent and meaning hereof that if the proposal, answers, and declaration made by the said Andrew J. Chew and bearing" the date of the policy, "and which are hereby made part and parcel of this policy, as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void," instructed the jury as follows:

"This clause of the policy made the answers to the questions part of the respective contracts; and the answers had thus the effect of warranties, and if they were wholly, or in any material respect, false or fraudulent, the plaintiff cannot recover. The jury will understand the words 'any material respect' as importing in any respect or de-
70 gree material to the risk insured, whether as to age or health, or otherwise howsoever."

With special reference to the question eleventh, whether Andrew J. Chew had ever had any one of twenty diseases mentioned in it, including rupture, and, if so, how long and to what extent, the judge, after reading this question and the answer to the jury, said to them: "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured, or if, at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion, your verdict should, in either case, be for the defendants. But, though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that from 1855, or thereabouts, until
71 after the last insurance in 1865, he had no such disease, and was, in all this interval, in the habit of working and using bodily exercise, and occasionally dancing, bathing, and travelling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium, and that there was, in this respect, no falsehood or wilful suppression, I cannot give the instruction seventhly requested in the absolute form in which it is expressed."

The judge then gave to the jury the instructions sixthly and seventhly requested, except as previously explained, in respect of the rupture, and without qualification as to any other disease.

As to the instruction fifthly requested he said: "If the jury believe that the answers to the questions numbered four and five were
72 materially untrue as to the age of the said Andrew J. Chew,

the policy is void, and the verdict must be for the defendants; and if he was 37 or even 35 years old, the difference was not immaterial. I give the fifth instruction as requested."

The remaining instructions, numbered eight to twelve, inclusive, were given as requested, the judge saying that the eleventh the word "fully" should be understood as meaning sufficiently to indicate the purpose and object.

It was agreed that the decision of the question involved in these five instructions should not be embarrassed by any objection to the party in whose name as plaintiff the suit is brought, or by any objection to legal as distinguished from equitable cognizance of the question. The judge thereupon instructed the jury "that if Mr. Brush was the agent of the defendants to receive the preliminary proofs, and having received them, knew that Mr. Selvage was negotiating with Mrs. France to purchase the policy of July, 1865, and by representing to him that the loss would be paid, induced him to pay to her $7,280 for the assignment
73 of it, without any fraud on his part or knowledge by him of the objections now made to its validity; then, if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiff's recovery on the policy of July, 1865, as have been made on the present trial, the jury may find a verdict for the plaintiff on this policy, although the objections would otherwise have been fatal."

And thereupon the counsel for the defendants did then and there except to the aforesaid charge of the court, as follows:

First. Because the learned judge declined to charge as requested in defendant's first point, to wit: "If the jury believe that the application for insurance and the policy in question, though nominally in the name of Andrew J. Chew for the benefit of Lucetta T. France, was, in fact, made and taken out by said Lucetta T. France for her own benefit, she must show an insurable interest in the life of said Andrew J.
74 Chew, before she can recover, and that the mere fact that she was his sister did not give her such insurable interest."

Second. Because the learned judge declined to charge as requested in defendant's second point, to wit: "If the jury believe that at the time the application for insurance was made, and the policy in question issued, Lucetta T. France was a married woman, and in no way dependant upon Andrew J. Chew for her support, either in whole or in part, the mere fact that she was his sister would not give her an insurable interest in his life."

Third. Because the learned judge declined to charge as requested in defendant's third point, to wit: "If the jury believe that at the time the application for insurance was made, and the policy in question issued, Andrew J. Chew was not indebted to Lucetta T. France, then she had no insurable interest as a creditor in the life of said Chew under the policy."

Fourth. Because the learned judge charged the jury "that if Andrew J. Chew was, at the time of the insurance, unmarried, and without
75 issue or parent living, the insurance for the benefit of his sister was valid, if the risk insured was truly described in the policy."

Fifth. Because the learned judge, after reading the clause in the policy, "It is also understood and agreed to be true intent and meaning hereof, that if the proposal, answers, and declaration made by the said Andrew J. Chew, and bearing" the date of the policy, "and which are hereby made part and parcel of this policy, as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any

respect false or fraudulent, then and in such case this policy shall be null and void," and stating that this clause made the answers to the questions part of the contract, and that "the answers had thus the effect of warranties," charged the jury that if the answers were wholly or in any material respect false or fraudulent, that is, in any respect or degree material to the risk insured, whether as to age or health or otherwise howsoever, the plaintiff cannot recover.

76 Sixth. Because the learned judge did not charge, as requested in defendant's fourth point, "that if the jury believe that the answers to the questions contained in the application, or any of them, either in whole or in part, were false and untrue, their verdict must be for the defendants;" but qualified his answer by charging with the qualification added to the words false or fraudulent, "in any respect or degree material to the risk insured, whether as to age or health or otherwise howsoever."

Seventh. Because the learned judge added the same qualification to his answer to the defendant's fifth point in respect to the words "false or fraudulent," referring to questions 4 and 5 as to age in the application.

Eighth. Because the learned judge added the same qualification to his answer to defendant's sixth point in respect to the words "false or fraudulent" referring to question eleven in the application as to the insured ever having had any of certain diseases therein inquired of.

77 Ninth. Because the learned judge declined to give the instruction requested in the defendant's seventh point in the absolute form in which it is expressed, but charged the jury as follows: "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question to soundness of his health when his life was insured; or if at that time, or within any such prior period, he wore a truss, in order that he might repress hernial extrusion, your verdict should, in either case, be for the defendants. But, though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred, in a worse form, in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that, from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was in all this interval in the habit of working and using bodily exercise, and occasionally dancing, bathing, and travelling, and could walk long distances without being fatigued, and either did not wear a truss or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium, and that there was, in this respect, no falsehood or wilful suppression, I cannot give the instruction seventhly requested in the absolute form in which it is expressed."

78

Tenth. Because the learned judge declined to charge the jury as requested in the defendant's sixth and seventh points, "except as previously explained in respect of the rupture."

Eleventh. Because the learned judge charged the jury in answer to the defendant's fifth point, with the added qualification of the word "materially" to the word "untrue," as follows: "If the jury believe that the answers to the questions numbered four and five were materially untrue, as to the age of the said Andrew J. Chew, the policy is void, and the verdict must be for the defendants; and if he was 37 or even 35 years old, the difference was not immaterial. I give the fifth instruction as requested."

79

Twelfth. Because the learned judge charged the jury in answer

to the defendant's eleventh point, to wit: "That unless the jury believe that Selvage, at the interview with Brush, the agent of the company, fully disclosed to him the purpose and object of his inquiries respecting the policy No. 11211, the defendants are not estopped from denying their liability by anything that Brush might have said," with the added qualification that the word "fully," in said point, should be understood as meaning "sufficiently to indicate the purpose and object."

Thirteenth. Because the learned judge charged the jury, that if Mr. Brush was the agent of the defendants to receive the preliminary proofs, and having received them, knew that Selvage was negotiating with Mrs. France, to purchase the policy of July, 1865, and by representing to him that the loss would be paid, induced him to pay to her $7,280, for the assignment of it without any fraud on his part, or knowledge by him of the objections now made to its validity, then if
80 the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiff's recovery on the policy of July, 1865, as have been made on the present trial, the jury may find a verdict for the plaintiff on this policy, although the objections would otherwise have been fatal.

And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record—

The said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided, this day of , A. D. 1873.

JOHN CADWALADER.]L. S.]

81 A.

Participating policy.

ÆTNA LIFE-INSURANCE COMPANY, HARTFORD, CONNECTICUT.

No. 11211. This policy of insurance witnesseth that the Ætna Life-Insurance Company, in consideration of the sum of two hundred forty-
Annual premium, $243.50. three dollars and fifty cents, to them in hand paid by Andrew J. Chew, for the benefit of Lucetta P. France, his sister, and of the annual premium of two hundred forty-three dol-
Note for one-half each year. lars and fifty cents, to be paid to said company on or before the twelfth day of July in every year during the continuance of this policy, do assure the life of Andrew J. Chew, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, in the
Term, life. amount of ten thousand dollars, for the term of his life. And the said company do hereby promise and agree to and with the said assured, her executors, administrators, and assigns, well and truly
Sum insured, $10,000. to pay, or cause to be paid, the said sum insured to the said assured, her executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Andrew J. Chew; and in either case all indebtedness of the party to the company shall be deducted from the sum insured. If any notes given by the said Andrew J. Chew for any portion of the cash part of premium

on the within policy for any current year shall mature and not be paid, the policy shall become void from that date, and all payments of premium thereon forfeited to said company: Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Andrew J. Chew shall die upon the seas, or shall, without the consent of this company, previously obtained and indorsed upon this policy, pass beyond the settled limits of the
82 United States, (excepting into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or shall, without such previous consent thus indorsed, visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, or shall, without such previous consent thus indorsed, pass to or west of the Rocky Mountains, or shall, without such previous consent thus indorsed, enter into any military or naval service whatsoever, (the militia not in actual service excepted,) or shall, without such previous consent thus indorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as conductor or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder; or in case he shall become so far intemperate as to impair his health seriously and permanently, or induce delirium tremens, or shall die by his own hand, or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the States or of the United States, or of any government where he may be, this policy shall be void, null, and of no effect.

And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by said Andrew J. Chew, and bearing date the twelfth day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void; or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, and in every such case, the
83 said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.

And it is further agreed, that in every case where this policy shall cease, or be or become void, all payments made thereon shall be forfeited to the said company, and also all profits and dividend-credits accruing therefrom. In witness whereof, the said Ætna Life-Insurance Company have by their president and secretary signed and executed this contract, in the city of Hartford, this twelfth day of July, 1865; but the same shall not be valid until countersigned by C. H. Brush, agent at Philadelphia.

E. A. BULKELEY,
President.

T. O. ENDERS,
Secretary.

Countersigned at Philadelphia, this seventeenth day of July, 1865.
C. H. BRUSH, *Agent.*

[U. S. int. rev. stamp, $1, affixed & cancelled.]

84 B.

PHILADELPHIA BRANCH ÆTNA LIFE-INSURANCE CO., HARTFORD, CONN.

CHAUNCEY H. BRUSH, *Manager*.

Questions to be answered by the party applying for insurance.	*Answers.*
1. Name & residence of the person for whose benefit the assurance is proposed and relationship to the party whose life is to be insured. ☞Give Christian names is full.	1. Lucetta P. France; No. 1742 South 2nd street; sister of.
2. Name, residence, & occupation of the person whose life is proposed to be insured.	2. Andrew J. Chew; No. 924 S. 2nd street.
3. What have been the former occupations of the party?	3. Shoe merchant.
4. Place and date of birth of the party whose life is to be insured?	4. Born in 1835, interlined (Oct. 28th,) Gloster Co., N. Jersey.
5. Age next birthday?	5. 30 years.
6. Is the party married?	6. No.
7. Are the habits of the party sober and temperate? Are they active or sedentary?	7. Yes. Active.
8. Has the party resided out of the United States or in southern climates; and if so, when, and for what period, and what was the state of health during the time?	8. No.
9. Has the party been or is he employed in the Army or Navy?	9. No.
10. Has the party been vaccinated or had the small-pox or varioloid?	10. Was vaxinated.
11. Has the party ever had any of the following diseases? If so, how long, and to what extent? Palsy, dropsy, palpitation, spitting of blood, epilepsy, yellow fever, consumption, rupture, apoplexy, asthma, convulsions, paralysis, bronchitis, disease of heart, disease of the lungs, insanity, gout, fistula, affection of the brain, fits.	11. None.
85 12. Is the party subject to habitual cough, dyspepsia, diarrhœa, dysentery, rheumatism, cholic?	12. No.
13. Has the party had during the last seven years any severe disease? If so, state the particulars and the name of the attending physician.	13. No.
14. Is the party now afflicted with any disease and disorder, and what?	14. No.
15. Has the party ever met with any severe personal injury? If so, of what nature?	15. No.
16. Are the parents of the party living? If so, what is their age respectively, and	16. No; don't know father's age, or of what

state of their health? If dead, about how old at their death, and cause of death?	disease he died with; mother died in her 52 year, of typhoid fever.
17. How many children have the parents of the party had?	17. 4.
18. How many are living, and the state of their health?	18. 3; in good health.
19. How many are dead, at about what age did they die, and what was the cause of their death?	19. One supposed de'd; left home 4 years ago, & did not hear from him since.
20. Name and residence of an intimate friend, to be referred to for information as to habits of the party.	20. Jacob Houser, No. 1517 S. 2nd street.
21. Has a proposal been made for insurance in any other office? And, if so, was it accepted?	21. No.
22. Is the party aware that any false or fraudulent allegation made in effecting the proposed assurance, will render the policy void, and that all payments of premium made thereon will be forfeited?	22. Yes.
23. Amount to be insured.	23. $10,000 *dollars.*
24. Term for which assurance is required.	24. For life.
25. Kind of policy desired.	25. Partis*a*pating.
26. Amount of premium and how payable.	26. $243.50; paid an'ul'y, 243.50.

86 It is hereby declared that the above are correct and true answers to the foregoing questions, and it is understood and agreed by the undersigned, that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health or neglect to pay the premium on or before the day it becomes due, shall render the policy null and void, and forfeit all payments made thereon; also, that the policy of insurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall be received by said company, or some authorized agent thereof, during the life-time of the party therein insured.

Dated at Philad'a, the 12th day of July, 1865.

LUCETTA P. FRANCE.
ANDREW J. CHEW.

Witness present—
JOHN SCOTT.

87 C.

Mr. Andrew J. Chew, examined twelfth day of July, 1865.

1. Height, figure, weight, number of inches around the chest, temperament, and habits of life.	1. 5 ft. 9½ in.; 137 lbs.; 35 inches; regular; tobacco moderately.
2. Whether any residence in southern, western, or foreign climates; and, if so, what effect was produced on the constitution and health?	2. Resided south & west. Health improved fully.

3. Whether any signs of apoplexy, epilepsy, insanity, or any other nervous affection, or of predisposition to them.	3. No predisposition.
4. Whether paralysis, tremors, or cramps in any part of the system; gout, aneurism, rupture, tumors, dropsy, or disease of the kidney or bladder.	4. None.
5. What is the stethoscopic character of respiration—is it full, gentle, and regular? Is the respiratory murmur healthy and clearly audible over both lungs?	5. Regular, full, natural, clear, & healthy.
6. Rate and other qualities of the pulse. Number of respirations per minute. Does percussion or auscultation indicate disease in any part of the viscera of the chest?	6. 70; 17; regular; not very strong; none of any kind.
7. Is the party subject to cough, expectoration, difficulty of breathing, or palpitation?	7. Never.
8. What is the stethoscopic character of the heart's action? Is it uniform and free, or is it irregular and violent, with unsteady rhythm?	8. Uniform, free; rhythm steady.
9. Does auscultation indicate enlargement, ossification, or disease of the heart of any kind?	9. No disease.
88 10. Are the abdominal and urinary organs in healthy condition?	10. Perfectly so.
11. Has the party ever suffered from mechanical injury or disease of any kind?	11. Nothing but bilious fever.
12. Are the party's parents living; and if not, of what disease did they die, and at what age?	12. Father unknown; mother 52; typhoid fever.
13. Are there any hereditary diseases in the family?	13. None known.
14. State the prospect of longevity.	14. Fair.
15. Do you consider the party safely insurable, and do you recommend the company to grant policy?	15. Safely insurable and so recommended.

(Signed) WM. B. ATKINSON,
Examining Physician.

Examined at 1517 S. 2nd, twelfth day of July, 1865.

89 D 1.

Proof required from party who has insured the life of another person.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Mrs. Lucetta T. France being duly sworn, deposes and says that she is the same person for whose benefit was effected an insurance on the life of Andrew Jackson Chew in the Ætna Life Insurance Company, of Hartford, Ct., on the 12th day of July, A. D. 1865, under policy No. 11,211, and on the 13th day of September, A. D. 1865, under policy No. 12,796.

Deponent further says that she had an insurable interest in the life of Andrew Jackson Chew to the amount of $20,000, and that the same was

not created by reason of any gambling or other illegal transaction, nor
No. 6. was the effecting of said insurance a mere gambling or speculating transaction. But the said Andrew Jackson Chew was indebted to me as follows, as his sister, and also for moneys loaned and advanced to him.

LUCETTA T. FRANCE.

Subscribed and sworn to before me this 12th day of June, A. D. 1872.
[SEAL.] ALEX. THACKARA,
Notary Public.

☞Where the policy was made for the benefit of the wife, it is absolutely required that she should fill out this certificate and state that her husband was indebted to her "as his true and lawful wife," or, "she being his true and lawful wife."

90 D 2.

Proof required as to the movements of party while insured by the company.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Mrs. Lucetta T. France, of Philadelphia, being duly sworn, deposes and says that she was personally acquainted with Andrew Jackson Chew, late of Philadelphia, deceased; that from the twelfth day of July,
No. 7. A. D. 1865, (the day the insurance was effected,) up to the 25th day of May, A. D. 1872, (the date of his decease,) the said Andrew Jackson Chew was not absent from the State of Pennsylvania, to the best of deponent's knowledge, information, or belief, except upon the occasions of a few short visits to Cape May, in New Jersey, and to New York City.

LUCETTA T. FRANCE.

Subscribed and sworn to before me this 12th day of June, A. D. 1872.
[SEAL.] ALEX. THACKARA,
Notary Public.

☞ If the party has been absent, state when, where, and how often, with every particular the party is possessed of.

91 D 3.

Physician's certificate of death for the Ætna Life-Insurance Company.

STATE OF PENNSYLVANIA,
County of Philada.:

Edward F. Guth, M. D., of Philada., being duly sworn, deposes and says that he is a physician by profession; that as such he attended Mr. Andrew Jackson Chew, of Philada., in his last illness; that he was called upon to attend on or about the 27th day of February, and continued with him as such until the time of his death, viz, on the 25th day of May, A. D. 1872; that the death of said Andrew Jackson Chew was not occasioned by his own hands, by duelling, by the hands of justice, or by the effects of intemperance; and that the following answers to the proposed questions give all the essential facts relating to his last illness.

1. What was the direct cause of death?	Pulmonary consumption.
2. What was the indirect cause of death?	
3. Was his last illness occasioned, or had his general health been impaired, by any pernicious habits?	No.
4. Was there a post-mortem examination? If so, state the particulars.	No.
5. Was any physician associated with you, or had any other physician been employed, in the management of the case? If so, state who.	No.
6. Was there anything remarkable, or such as this office should be made acquainted with, developed by the history, progress, or treatment of the case? If so, state the particulars in full.	Nothing but *h*as in ordinary consumption.

EDWARD F. GUTH.

Subscribed and sworn to before me this eleventh day of June, 1872.
[NOTARIAL SEAL.] ALEX. THACKARA,
Notary Public.

☞The medical attendant will please be as explicit as possible in stating the cause of death; e. g., if heart-disease, state whether valvular, hypertrophy, fatty degeneration, &c., and so with other diseases.

92 E 1.

ÆTNA LIFE-INSURANCE COMPANY,
Hartford, Conn., Aug. 23, 1872.

SAMUEL B. SELVEGE, Esq.,
No. 1024 *Race St., Phila., Pa.*

DEAR SIR: In reply to your letter of the 22nd inst., would say the papers relating to the claim made by you on this company are in the possession of Mr. F. M. Hayden, our adjuster. The proofs of death were not rec'd till June 15th. The company are allowed 90 days from receipt of proof and evidence of death in all cases before payment can be demanded.

I remain yours, truly,

T. O. ENDERS, *Pres'd't.*

E 2.

PHILADA., *Aug.* 22*nd*, 1872.

FRIEND ENDERS: I called on Brush to-day, to know if he was ready to pay me the life-policy. I purchased of Mrs. France on the life of her brother Andrew Chew.

And he told me to look to you for a settlement. I think the money now due; therefore please remit me my portion of the insurance (the first $10,000 policy, all cash premium) at your earliest convenience, and oblige,

Yours, respectfully,

SAMUEL B. SELVEGE.

1034 Race St.

93 No. 1.] F 1.

Identity of party.

STATE OF PENN.,
County of P'a, ss:

John Dunn, of Philada., being duly sworn, deposes and says that he was personally acquainted with Mr. Andrew Jackson Chew, of Philada., now deceased, and that the said Andrew Jackson Chew was the identical person whose life was insured in the Ætna Life-Insurance Company, under policy No.* , bearing date the day of , A. D. 18 , and who was therein described as Mr. , of .

JOHN DUNN.

Subscribed and sworn to before me this eleventh day of June, A. D. 1872.

[NOTARIAL SEAL.] ALEX. THACKARA,
Notary Public.

94 No. 2.] F 2.

Proof from or *undertaker.*

STATE OF PENN.,
County of P'a, ss:

John S. Kennelly, being duly sworn, deposes and says that he is the sexton of 235 Queen st., Philada. He was called upon on the 25th day of May last to prepare the dead body of Andrew Jackson Chew for burial; that he placed said body in a coffin, and duly closed and fastened the lid, and that he placed said coffin, containing the said body, in a vault in *in* Union, and that the said coffin was left by deponent in said ground.

JOHN S. KENNELLY.

Subscribed, and sworn to before me this eleventh day of June, A. D. 1872.

[NOTARIAL SEAL.] ALEX. THACKARA,
Notary Public.

95 No. 3.] F 3.

Proof from minister or other party who officiated at the interment of the deceased.

STATE OF PENN.,
County of P'a, ss:

Chas. M. Leisenring, being duly sworn, deposes and says that he is a Past Sachem of Idaho tribe of Red Men, No. 73, and that he was personally acquainted with Mr. Andrew Jackson Chew, of Philada., in his life-time, now deceased, and that said Andrew Jackson Chew was interred in the burial-ground of the Union Ground on the 29th day of May, A. D. 1872, and that he as marshall officiated at said interment, there being no officiating clergyman present.

CHAS. M. LEISENRING.

Subscribed and sworn to before me this eleventh day of June, A. D., 1872.

[NOTARIAL SEAL.] ALEX. THACKARA,
Notary Public.

* Please be careful to give the right number.

96 No. 4.] F 4.

*Proof of the age of party.**

PHILA., *Pa.*

Mrs. Mary Chew, the wife of Andrew Jackson Chew, late of Philad'a, deceased, being duly sworn, deposes and says that the said Andrew Jackson Chew was born 3 miles below Woodbury, New Jersey, on the 28th day of October, 1828, and that the said Andrew Jackson Chew was consequently, on the 25th of May, 1872, (the date of his decease,) 43 years and six months and 27 days old.

MARY CHEW.

Subscribed and sworn to before me this eleventh day of June, A. D. 1872.

ALEX. THACKARA,
Notary Public.

97 G.

To be attached to the policy numbered 11211, issued by the Ætna Life-Insurance Company, of Hartford, Conn.

For value received, we hereby transfer, assign, and turn over unto Samuel B. Selvage, of Philadelphia, Pa., all our right, title, and interest in policy of life insurance No. 11211, issued by the Ætna Life-Insurance Company, of Hartford, Conn., and all benefit and advantage to be derived therefrom to the amount of two thousand dollars, the amount of our indebtedness unto said Samuel B. Selvage, or indebtedness of either of us.

Witness our hand and seal this 20th day of April, 1872.

(Signed) DAVID FRANCE. [L. S.]

Signed, sealed, and delivered in the presence of—

——— ——— [L. S.]

98 H.

Mr. ALEXANDER or Mr. BRUSH:

Would you please be kind enough to transfer A. J. Chew's policy to Mr. Selvage, & oblige,

Very respectfully, yrs.,

LUCETTA T. FRANCE.

JUNE 11TH, '72.

I.

PHILADELPHIA, *June 11th*, 1872.

J. L. ENGLISH, *Sec.:*

DEAR SIR: I have just received the enclosed notice:

Before death of the party an assignment was drawn & signed by Mrs.

☞ * This affidavit may be made by a relation of the party. In all cases the fullest and most satisfactory evidence as to the age of the person insured must be furnished, in order to make the proof of claim complete.

Lucetta T. France, and you advised that it would be necessary for her husband also to sign, & I so advised the parties. They now claim that by Penna. law, according to Judge Cadwalader's opinion, it was not necessary for the husband to join. I asked them to obtain & send you the judge's opinion in writing, if they desired to do so.

C. H. BRUSH.

99 C. C. U. S., E. D. Pa., Octo. sess., 1872.—No 6.

DAVID FRANCE AND WIFE, TO THE USE OF Samuel B. Selvage,
vs.
THE ÆTNA LIFE-INSURANCE COMPANY, OF Hartford, Conn.

To the end that the fact may clearly appear upon the argument of this case in error, without the introduction of a large amount of otherwise useless matter in the bill of exceptions, it is admitted that the above-entitled case was tried at the same time with, and before the same jury, and upon the same evidence, points, and legal instructions by the court, as a case to October sess. 1872, No. 7, brought by the plaintiffs, David France and Lucetta T., his wife, in right of the said Lucetta, and to her use against the same defendants, upon a policy of insurance for $10,000, on the life of the said Andrew J. Chew, in the same form as exhibit A,

100 annexed to the bill of exceptions in this case, dated the 13th day of September, 1865, the application and answer of the assured in said case No. 7 being substantially similar to exhibit B, with the exception that the answer to question 4, "Place and date of birth of the party whose life is to be insured," was "4. Born New Jersey, in 1835," and to question 5, "Age next birth-day," "5. Thirty years October 28, as near as I can recollect," &, at the foot of the answers, and immediately preceding the declaration of the correctness of the answers which was signed by Mrs. France and the assured Andrew J. Chew *who* inserted the words, "the above is as near correct as I remember," and that at the same time that the verdict in this present case was found for the plaintiff, the same jury in the said case to October sess., 1872, No. 7, found a verdict for the defendants.

N. H. SHARPLESS,
Atty. for Plffs.
SAML. C. PERKINS,
Atty. for Defts.

101 Whereupon afterwards, to wit, on the 16th day of May, A. D. 1873, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find for the plaintiffs, and assess the damages at ten thousand four hundred dollars, with costs.

And thereupon the plaintiffs aforesaid, by their attorney aforesaid, pray judgment upon the verdict aforesaid, and the said defendants, by their attorney aforesaid, say that the court here ought not to render judgment of and upon the said verdict, and pray that the verdict aforesaid may be quashed, and that the issue aforesaid may be tried anew by other jurors, to be afresh empanelled; because—

1. The learned judge erred in declining to charge the jury as requested in defendants' first, second, and third points, and in charging, in answer to these points, as follows:

"That if Andrew J. Chew was, at the time of the insurances, unmar-

ried, and without issue or parent living, the insurance for the benefit of his sister was valid, if the risk insured was truly described in the policies."

102 2. The learned judge erred in declining to charge the jury, as requested in the defendants' fourth point, and in charging, in answer to this point, as follows:

"I will read the clause in the policy, which is in these words: 'It is understood and agreed to be the true intent and meaning hereof that if the proposal, answers, and declaration made by the said Andrew J. Chew, and bearing the date of the respective policies, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then, and in such case, this policy shall be null and void.' This clause of the policies made the answers to the questions part of the respective contracts; and the answers have thus the effect of warranties; and if they were wholly or in any material respect false or fraudulent, the plaintiff cannot recover. The jury will understand the words 'any material respect' as importing in any respect or degree material to the risk insured, whether as to age or health, or otherwise howsoever."

3. The learned judge erred in declining to charge the jury, as requested in the defendants' 6th & 7th points, and in charging the

103 jury in answer to these points as follows:

"With special reference to the 11th question, whether Andrew J. Chew had ever had any one of twenty diseases mentioned in it, including rupture; and, if so, how long and to what extent, I will read this question and the answer.

"11. Has the party ever had any of the following diseases? If so, how long and to what extent? Palsy, spitting of blood, consumption, asthma, bronchites, rupture, convulsions, disease of the heart, insanity, fistula, diseases of the lungs, gout, affection of the brain, dropsy, epilepsy, fits, palpitation, yellow fever, apoplexy, paralysis. The answer is, 'None,' in each case.

"As to rupture, if you believe that Andrew J. Chew was ruptured at the time, or at any such previous period, that the rupture may have been material to any question of the soundness of his health when his life was insured; or if, at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion, your verdict should, in either case, be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accident-

104 ally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that from 1855, or thereabouts, until after the last insurance, in 1865, he had no such disease, and was, in all this interval, in the habit of working and using bodily exercise, and occasionally dancing, bathing, and travelling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium; and that there was in this respect no falsehood or wilful suppression, I cannot give the instruction seventhly requested in the absolute form in which it is expressed.

"But I give you the instructions 6thly and 7thly requested, except as previously explained in respect of the rupture, and without qualification as to any other disease."

4. The verdict was against the charge of the learned judge in affirm-

ing defts.' 9th point in respect of the $2,000 loaned by Selvage to Mrs. France before the death of Chew, upon an assignment of the policy as collateral.

105 5. The verdict was against the evidence that before Selvage paid Mrs. France the $7,280, after the death of Chew, Brush, the agent of the defendants, told Selvage that he had no authority to act.

6. The verdict was against the evidence that Selvage did not disclose to Brush, the agent of the defendants, the purpose and object of his inquiries respecting the policy sufficiently to indicate that purpose and object.

7. The verdict was against the evidence that Brush, the agent of the company, qualified any statement he may have made that the policy would be paid by adding "if the claim was a just one," or words to that effect.

8. The verdict was against the evidence that the statements made by Brush, the agent of the company, to Selvage, and on the faith of which the latter claims to have purchased the policy and paid Mrs. France the $7,280 therefor, were made before and not after the preliminary proofs had been received by B'ush.

9. The verdict was against the evidence that there was no waiver of valid objections by B'ush, the agent of the company, to the payment of the policy, either expressly, or "mutually understood and intended."

106 10. The verdict was against the evidence that Brush, the agent of the defendants, did not, by representing to Selvage that the loss would be paid, induce him to pay Mrs. France the $7,280 for the assignment of the policy.

11. The verdict was against the evidence that Brush, the agent of the defendants, did not know that Selvage was negotiating with Mrs. France to purchase the policy.

12. The verdict was against the evidence as to the age of Chew.

13. The verdict was against the evidence as to the rupture.

14. The verdict was against the weight of the evidence.

15. The verdict was against the charge of the court.

16. The verdict was against the law.

CHRISTIAN KNEASS,
SAM'L C. PERKINS,
Attys. for Defts.

MAY 19, 1873.

107 And afterwards, to wit, on the 18th day of October, A.D. 1873, this cause comes on to be heard upon the motion and reasons for new trial aforesaid, and, after hearing, it is considered by the court here that the motion for a new trial be refused and the reasons dismissed. And that the said David France and Lucetta T. France, his wife, in right of the said Lucetta and to her use, to the use of Samuel B. Selvage, do recover against the said The Ætna Life-Insurance Company, of Hartford, Connecticut, as well the said sum of ten thousand four hundred dollars, debt aforesaid, as also the sum of , for their costs and charges about their suit in that behalf expended to the said plaintiffs by the court here adjudged, &c.

108 *Assignments of error.*

In the circuit court of the United States for the eastern district of Pennsylvania, October sessions, 1872.

DAVID FRANCE AND LUCETTA T. FRANCE, his wife, in right of said Lucetta, and to her use, to the use of Samuel B. Selvage,
vs.
THE ÆTNA LIFE-INSURANCE COMPANY, OF Hartford, Connecticut.

Assignments in error. No. 6.

Sur writ of error on the part of defendants.

1. Because the learned judge erred in declining to charge, as
109 requested in defendants' first point, to wit: "If the jury believe that the application for insurance and the policy in question, though nominally in the name of Andrew J. Chew, for the benefit of Lucetta T. France, was in fact made and taken out by said Lucetta T. France for her own benefit, she must show an insurable interest in the life of said Andrew J. Chew before she can recover, and the mere fact that she was his sister did not give her such insurable interest."

2. Because the learned judge erred in declining to charge, as requested in defendants' second point, to wit: "If the jury believe that at the time the application for insurance was made, and the policy in question issued, Lucetta T. France was a married woman, and in no way dependent upon Andrew J. Chew for her support, either in whole or in part, the mere fact that she was his sister would not give her an insurable interest in his life."

3. Because the learned judge erred in declining to charge, as requested in defendants' third point, to wit: "If the jury believe that at the time the application for insurance was made, and the policy in question issued, Andrew J. Chew was not indebted to Lucetta T. France,
110 then she had no insurable interest as a creditor in the life of said Chew under the policy."

4. Because the learned judge erred in charging the jury that, "If Andrew J. Chew was, at the time of the insurance, unmarried and without issue or parent living, the insurance for the benefit of his sister was valid, if the risk incurred was truly described in the policy."

5. Because the learned judge erred in not charging the jury, as requested in defendants' fourth point, to wit: "That the answers to the questions contained in the application upon which the policy was issued are warranties, and, if the jury believe that such answers, or any of them, either in whole or in part, were false and untrue, their verdict must be for the defendants."

6. Because the learned judge erred in charging the jury, in answer to defendants' fifth point, which was as follows: "If the jury believe that the answers to questions Nos. 4 and 5 in the applications for insurance, as to the date of birth, and age next birthday, of said Andrew J. Chew, were false and untrue, the policy issued upon the appli-
111 cation is void and their verdict must be for defendants," with the added qualification of the word "materially," prefixed to the word "untrue."

7. Because the learned judge erred in having, after reading to the jury the clause of the policy in the words, "It is also understood and agreed to be the true intent and meaning hereof that if the proposal, answers,

and declarations made by the said Andrew J. Chew, and bearing" the date of the policy, "and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then, and in such case, this policy shall be null and void," instructed the jury as follows: "This clause of the policy made the answers to the questions part of the contract, and the answers had thus the effect of warranties, and if they were wholly or in any material respect false or fraudulent, the plaintiff cannot recover. The jury will understand the words 'any material respect' as importing in any respect or degree material to the risk insured, whether as to age or health, or otherwise howsoever," whereas he should have charged that if the answers
112 were wholly or in any respect false or fraudulent, the plaintiff cannot recover, and not have qualified his charge on this branch of the case by the words "any material respect," and "in any respect or degree material to the risk insured."

8. Because the learned judge erred in not charging the jury, as requested in the defendants' sixth point, to wit, "If the jury believe that the answer to question No. 11 in the application for insurance, 'whether said Andrew J. Chew ever had any of the diseases therein specified, &c.,' was false and untrue as to any one of said diseases, the policy issued upon the application is void, and their verdict must be for defendants."

9. Because the learned judge erred in not charging the jury, as requested in the defendants' seventh point, to wit, "If at the time when the application for insurance was made, and the policy was issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact, and also how long and to what extent; and if the jury believe that at the time mentioned he was or had been ruptured, his answer, 'None,' to said question No. 11 was
113 untrue and false, and their verdict must be for the defendants."

10. Because the learned judge erred in having after reading to the jury the eleventh question in the application, and the answer in the words "has the party ever had any of the following diseases? If so, how long, and to what extent? Palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, gout, affection of the brain, dropsy, epilepsy, rapture, convulsions, disease of heart, insanity, fistula, fits, palpitation, yellow fever, apoplexy, paralysis." "None," charged the jury as follows:

"If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period, that the rupture may have been material to any question of the soundness of his health when his life was insured, or if, at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion, your verdict should,
114 in either case, be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that, from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was, in all this interval, in the habit of working and using bodily exercise, and occasionally dancing, bathing, and travelling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium, and that there was, in this respect, no falsehood or wilful suppression; I cannot give the in-

struction seventhly requested in the absolute form in which it is expressed.

11. Because the learned judge erred in charging the jury in answer to defendants' eleventh point, which was as follows: "that unless the jury believe that Selvage, at the interview with Brush, the agent of the co., fully disclosed to him the purpose and object of his inquiries
115 respecting the policy No. 11211, the defendants are not estopped from denying their liability by anything that Brush might have said," with the qualification that the word "fully" in said point "should be understood as meaning sufficiently to indicate the purpose and object."

12. Because the learned judge erred in not charging the jury as requested in defendants' thirteenth point, to wit, that unless the jury believe there was an absolute and unqualified assertion by Brush, the agent of the company, that the policy (or the monies) would be paid absolutely and in any event, and that upon the faith of such an assertion alone, Selvage paid the $7,280 to Mrs. France, the defendants are not estopped from denying their liability.

13. Because the learned judge erred in charging the jury as follows: that if Mr. Brush was the agent of the defendants to receive the preliminary proofs; and, having received them, knew that Mr. Selvage was negotiating with Mrs. France to purchase the policy of July, 1865, and by representing to him that the loss would be paid, induced him to pay to her $7,280 for the assignment of it, without any fraud on his part or knowledge by him of the objections now made to its validity,
116 then if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plantiffs' recovery on the policy of July, 1865, as have been made on the present trial, the jury may find a verdict for the plaintiff on this policy although the objections would otherwise have been fatal.

SAM'L C. PERKINS,
Defts.' Atty.

117 UNITED STATES,
Eastern District of Pennsylvania, sct:

To David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage.

Whereas by a writ of error issuing out of the Supreme Court of the United States directed to the judges of the circuit court of the United States, holden in and for the eastern district of Pennsylvania, wherein you the said David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, are the defendants in error, and the Ætna Life-Insurance Company of Hartford, Connecticut, is the plaintiff in error, the said judges are directed to send the record and process of a certain suit with all things concerning them, so that the same may be had before the Supreme Court of the United States, at the city of Washington, District of Columbia, there to be held on the first Monday of December next, in which suit the Ætna Life-Insurance Company of Hartford, Connecticut, is the original defendant, and you, the said David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, are plaintiffs, in a plea of trespass on the case upon promises, that, the record and process aforesaid being inspected, they the said Supreme Court of the United States may cause to be done thereupon what of

right ought to be done, and the said The Ætna Life-Insurance Company of Hartford, Connecticut, having made an assignment of errors and given good and sufficient security that the plaintiffs in error shall well and truly prosecute their said writ of error to effect, and answer all such costs as upon an affirmance of the judgment of the said circuit court may be adjudged to the defendant in error: You are hereby cited to appear (if you see cause) at the said Supreme Court at the time and place aforesaid, to answer to the said writ of error, and the errors assigned by the said The Ætna Life-Insurance Company of Hartford, Connecticut.

Given under my hand this twenty-ninth day of October, one thousand eight hundred and seventy-three.

JOHN CADWALADER, *Judge.*

I accept service of the above citation.

N. H. SHARPLESS,
Atty. for Deft. in Error.

118 *Bond.*

Know all men by these presents that we, Chauncey H. Brush, of No. 1514 Pine street, in the city of Philadelphia, county of Philadelphia, and State of Pennsylvania, insurance agent, and Charles P. Turner, of No. 1506 Walnut street, in said city, doctor of medicine, are held and firmly bound unto David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, in the full and just sum of twenty thousand (20,000) dollars, to be paid to the said David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this twenty-ninth day of October, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas, lately at a circuit court of the United States for the eastern district of Pennsylvania, in a suit depending in said court to October sessions, 1872, No. 6, between David France and Lucetta T. France,
119 his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, plaintiffs, and The Ætna Life-Insurance Company of Hartford, Connecticut, defendants, judgment was rendered against the said Ætna Life-Insurance Company of Hartford, Connecticut, and the said Ætna Life-Insurance Company, of Hartford, Connecticut, having obtained their writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Ætna Life-Insurance Company of Hartford, Connecticut, shall prosecute their writ of error to effect, and answer all damages and costs if

they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAUNCEY H. BRUSH. [L. S.]
CHAS. P. TURNER. [L. S.]

Sealed and delivered in presence of—
SAMUEL BELL.
W. GRIER HIBLER.

120 Approved by me (after having read the written examinations sworn by the obligors.)

JOHN CADWALADER, *Judge.*

31 OCTOBER, 1873.

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121 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record & proceedings of the said court in a certain plea therein lately depending, wherein David France & Lucetta T. France, his wife, in right of the said Lucetta & to her use, to the use of Samuel B. Selvage, are plaintiffs, and the Ætna Life-Insurance Company, of Hartford, Connecticut, is defendant, of October sessions, 1872, No. 6, so full and entire as the same now remain among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixth day of January, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of these United States the ninety-eighth.

[SEAL.] SAMUEL BELL,
Clerk of Circuit Court U. S. E. D. of Pennsylvania.

122 UNITED STATES,
Eastern District of Pennsylvania, sct:

[SEAL.] The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because, that in the record and process, and also in the rendering of judgment in a suit before you, between David France and Lucetta T. France, his wife, in right of said Lucetta and to her use, to the use of Samuel B. Selvage, plaintiffs, and The Ætna Life-Insurance Company, of Hartford, Connecticut, defendants in a plea of trespass on the case upon promises, a manifest error has entervened to the great damage of the said The Ætna Life-Insurance Company of Hartford, Connecticut, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the *the* Supreme Court of the United

States, at the city of Washington, District of Columbia, there to be held on the first Monday of December next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, at Philadelphia, this twenty-ninth day of October, A. D. one thousand eight hundred and seventy-three, and in ninety-eighth year of the Independence of the said United States.

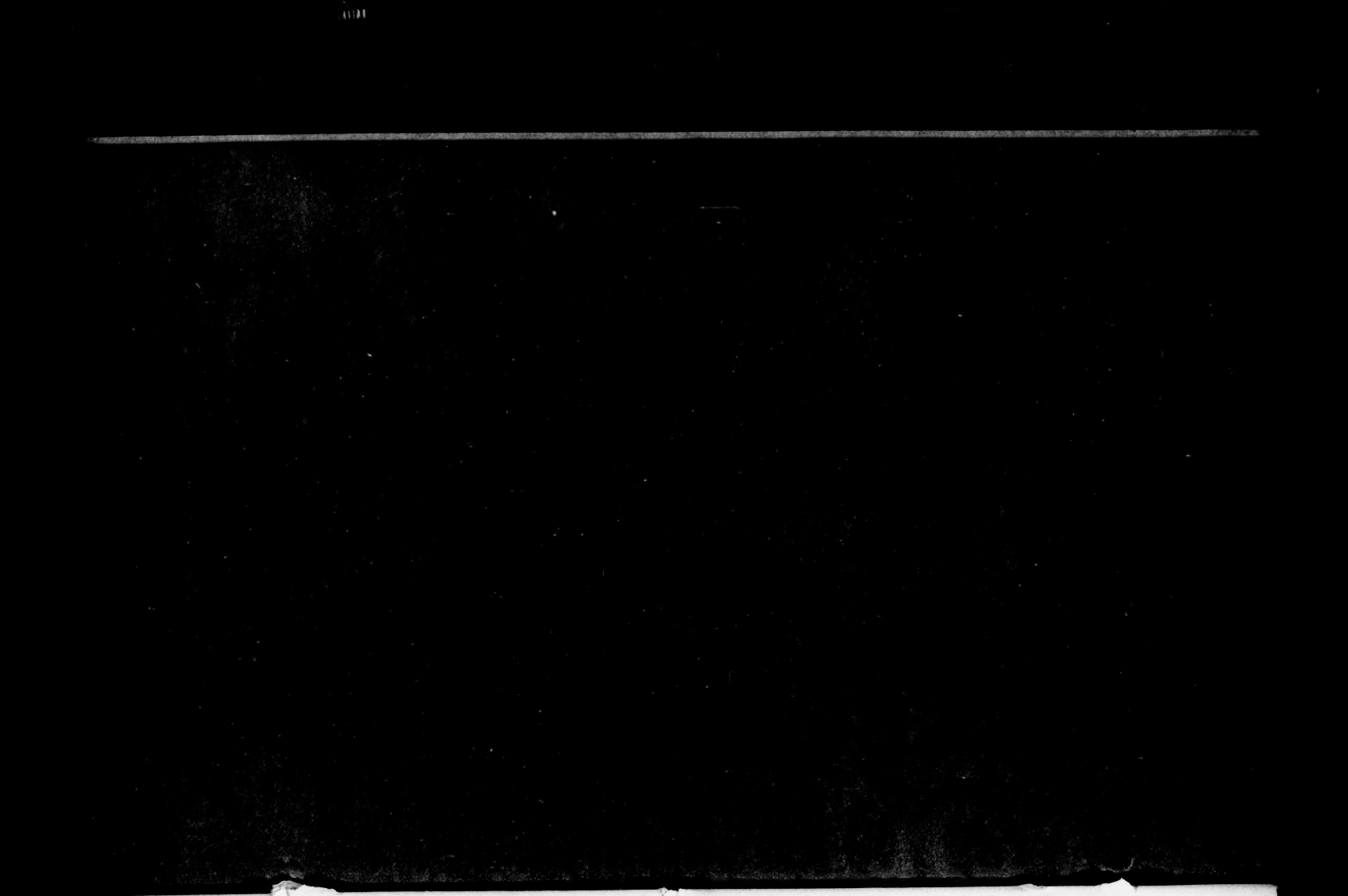
SAMUEL BELL,
Clerk Cir. Ct. U. S. E. D. of Pa.

Allowed.

JOHN CADWALADER, *Judge.*

(Indorsed:) Writ of error.

(Indorsement on cover:) No. 132. The Ætna Life-Insurance Company of Hartford, plaintiff in error, vs. David France and Lucetta T. France, his wife, to use of Samuel B. Selvage. E. Pennsylvania C. C. U. S. Filed 12 January, 1874.



IN THE SUPREME COURT OF THE UNITED STATES.

No. 132. October Term, 1875.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Plaintiffs in Error*,

v.

DAVID FRANCE AND LUCETTA T. FRANCE, HIS WIFE, IN RIGHT OF SAID LUCETTA AND TO HER USE, TO THE USE OF SAMUEL B. SELVAGE, *Defendants in Error*.

Writ of Error to the Circuit Court of the U. S. for the E. D. of Pa.

BRIEF FOR PLAINTIFFS IN ERROR.

SAMUEL C. PERKINS,
Of Counsel.

HENRY B. ASHMEAD, Book and Job Printer, 1102 & 1104 Sansom Street, Philadelphia.

In the Supreme Court of the United States.

OF OCTOBER TERM, 1875, No. 132.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Plaintiffs in Error, defendants below,*

v.

DAVID FRANCE and LUCETTA T. FRANCE, his wife, in right of said Lucetta and to her use, to the use of SAMUEL B. SELVAGE, *Defendants in Error, plaintiffs below.*

BRIEF FOR PLAINTIFFS IN ERROR.

I.—STATEMENT OF THE CASE.

This was an action of assumpsit upon a policy of life insurance, originally brought in the District Court for the City and County of Philadelphia, by the plaintiffs (defendants in error), citizens of Pennsylvania, against the defendants (plaintiffs in error), a corporation and citizens of Connecticut. The action was duly removed by the defendants to the Circuit Court of the United States for the Eastern District of Pennsylvania. (Record, pp. 1–5.)

The policy (No. 11,211) was dated July 12, 1865, countersigned by the defendants' agent at Philadelphia, July 17, 1865, for $10,000, upon the life of Andrew J. Chew, for the term of his life, in consideration of $243 50 paid to them by said Chew for the benefit of Lucetta

T. France, his sister, and of the annual premium of a like amount during the continuance of the policy (Record, pp. 26, 27).

The policy, in addition to other matters not material to the present case, contained the following clause (Record, p. 27):

"*And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by said Andrew J. Chew, and bearing date the twelfth day of July,* 1865, *and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void.*"

The "proposal" referred to contained *inter alia* the following "answers and declaration" (Record, pp. 28, 29):

PHILADELPHIA BRANCH ÆTNA LIFE INSURANCE CO., HARTFORD, CONN.

CHAUNCEY H. BRUSH, *Manager.*

Questions to be answered by the party applying for insurance.	*Answers.*
4. Place and date of birth of the party whose life is to be insured?	4. Born in 1835 [interlined "Oct. 28th"], Gloster Co., N. Jersey.
5. Age next birthday?	5. 30 years.
11. Has the party ever had any of the following diseases? If so, how	11. None.

long, and to what extent? Palsy, dropsy, palpitation, spitting of blood, epilepsy, yellow fever, consumption, rupture, apoplexy, asthma, convulsions, paralysis, bronchitis, disease of heart, disease of the lungs, insanity, gout, fistula, affection of the brain, fits.	
12. Is the party subject to habitual cough, dyspepsia, diarrhœa, dysentery, rheumatism, colic?	12. No.
13. Has the party had during the last seven years any severe disease? If so, state the particulars and the name of the attending physician.	13. No.
14. Is the party now afflicted with any disease and disorder, and what?	14. No.
22. Is the party aware that any false or fraudulent allegation made in effecting the proposed insurance will render the policy void, and that all payments of premium made thereon will be forfeited?	22. Yes.

It is hereby declared that the above are correct and true answers to the foregoing questions, and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the pre-

mium on or before the day it becomes due, shall render the policy null and void, and forfeit all payments made thereon.

Dated at Philad'a, the 12th day of July, 1865.

LUCETTA P. FRANCE.
ANDREW J. CHEW.

Witness present—
JOHN SCOTT.

The annual premiums had been regularly paid (Record, p. 20, *orig.*, p. 61) up to the time of the death of the life insured, Andrew J. Chew, who died May 25, 1872, of pulmonary consumption. (Record, pp. 20, 31, 32, *orig.*, pp. 61, 91.)

The defences were:

Want of insurable interest, there being no interest alleged or shown except the mere fact of relationship.

That the life insured, Andrew J. Chew, was seven years older than he had declared in his proposal.

That he had been ruptured, contrary to his declaration in his proposal.

The plaintiffs in addition to a denial of the alleged falsity of the declaration, relied upon an alleged waiver of the objections, on the faith of which waiver the equitable plaintiff had purchased the policy after the death of the life insured.

The Declaration (Record, pp. 5–10), after setting out the policy *in hæc verba*, averred the consideration for the promise therein contained; the payment of the annual premiums until the death of the life insured, Andrew

J. Chew; the interest of Lucetta T. France therein at the time it was made, during all its continuance, and at the time of Chew's death to the full amount of the sum insured; the death of Chew; and that due notice and proof of death was furnished to the company. It then negatived specifically all the acts set forth in the policy as making it void; alleged generally that the proposal, answers and declarations made by Chew in his application were not in any respect false or fraudulent; averred that ninety days (the time fixed by the policy) had elapsed, and demand and refusal to pay.

A second count differed from the first in omitting the averment of the interest of Lucetta T. France in the life of Chew; and in respect to the denial of any acts set forth in the policy as making it void, which was put in the general form (Record, p. 9, *orig.*, p. 24) that Chew "did not in his lifetime violate any of the conditions or stipulations of the policy, nor did he die in any of the ways in which it was provided in said policy that the same should thereupon become void and of no effect." This count also omitted the averment that the proposal, &c., were not false or fraudulent.

Common counts were added for money due upon an account stated, for money had and received, and for interest.

The defendants pleaded (Record, pp. 10–14):

(1) Set-off, and as to the common counts (16), *non assumpserunt;* as to the first count (2) that Mrs. France was not interested in the life of Chew, *modo et forma;* as to the second count (15) that at the time of the making of the policy or at any time afterwards, Mrs.

France had not an interest in the life of Chew to support the policy; and as to the first and second counts, twelve special pleas (Nos. 3–14).

Pleas Nos. 3, 5 and 6, set up fraud and wrongful concealment of material information which ought to have been communicated to defendants, and by the misrepresentation (No. 3) of Mrs. France by her agent said Chew and others in collusion with her, (No. 15) of Mrs. France personally and only, and (No. 6) of said Chew personally and only; Nos. 4 and 7, fraud, falsehood and misrepresentation as to the true age of Chew, and as to the diseases or injuries which he had had, and fraudulent suppression, concealment and withholding of material information in regard to the said Chew and then affecting the risk, and which before and at the time of issuing the policies were known to the plaintiff, Mrs. France, and with which defendants ought then to have been made acquainted, to wit, that Chew was thirty-six years old, and had been ruptured; No. 4 alleging the fraud and concealment, &c., to have been by Mrs. France by her agent, said Chew and others in collusion with her; and No. 7 alleging the fraud, &c., to have been by Mrs. France individually and only.

Nos. 8 and 9 set up the condition that the statements in the proposal, answers and declarations by said Chew should form the basis of the contract of insurance, and that any untrue or fraudulent answers should render the policy null and void, and that with respect to the answers respectively to question 4 as to the date of Chew's birth, and to question 5 as to his age next birthday, said Chew at the time of the answers well knew respectively that he was not born in 1835 but in 1828,

and that his age next birth-day would not be thirty years but thirty-seven years.

No. 10, same as Nos. 8 and 9, except that it relates to the answer to question 11, and set up that Chew at the time of the answer well knew that he had had one of the diseases inquired of, to wit, rupture.

No. 11 sets up the condition that the statements in the proposals, answers and declarations by said Chew, should form the basis of the contract of insurance, and that if said proposals, &c., should be found in any respect false or fraudulent, the policy should be null and void, and alleges that "certain answers of said Chew were at the time of the making thereof false and untrue."

Nos. 12, 13 and 14, same as No. 11, except that they allege specifically that the answers to questions 4, as to date of birth,—5, as to age next birth-day,—and 11, as to said Chew's having had certain diseases were respectively false and untrue, and stating wherein they were so.

The plaintiffs (Record, pp. 14, 15), as to pleas Nos. 2 and 16, joined issue; as to No. 1, replied *nil debet;* as to Nos. 3, 5 and 6, they replied by denials *in hæc verba;* to Nos. 8 and 9, by denials of the averment of knowledge of Chew as to the alleged falsity of his answers respecting the date of his birth and age, and the truth of the date and age alleged in these pleas respectively; to No. 11, by denial of the falsity of Chew's answers; to No. 15, by averment of interest of Mrs. France in the life of Chew.

To all these replications, except the two first, defendants rejoined with a *similiter* (Record, p. 18, *orig.*, p. 53).

To pleas Nos. 4, 7, 10, 12, 13 and 14, the plaintiffs replied (Record, pp. 14, 15, *orig.* pp. 40, 41, 43) in such manner that the defendants demurred (Record, pp. 16–18).

After hearing and argument upon the demurrer, it was, by leave of the Court, agreed that the pleas last mentioned, together with the replications and the demurrers, be withdrawn; the defendants to file pleas of *non-assumpserunt* and set-off, with leave, &c., in lieu of said pleas, which were to be treated and regarded as notice of special matter, and the defendants on the trial might give in evidence any facts which might have been given under the pleas so withdrawn, and also any facts showing or tending to show, by reason of fraud or otherwise, that defendants never undertook and promised as in the declaration alleged (Record, pp. 18, 19, *orig.* p. 54).

Pleas were filed in accordance with the agreement, and replications thereto (Record, p. 19, *orig.* pp. 56, 57).

Thus the case was at issue upon the special pleas Nos. 2 and 15 as to interest; Nos. 3, 5 and 6 as to fraud, concealment and misrepresentation in obtaining the policy; Nos. 8 and 9 as to the knowledge of Chew of the falsity of his answers as to his date of birth and age; and No. 11 as to the falsity of "certain" of his answers; and also upon the general issue, with leave specially to give certain facts in evidence.

The case was tried May 6, 1873, before Hon. John Cadwalader and a special jury (Record, p. 20). At the same time, before the same jury, and upon the same

evidence, points and legal instructions by the Court, there was tried an action of assumpsit, brought by the plaintiffs France and wife, in right of the wife and to her use, against the same defendants, upon a similar policy (No. 12,796) upon the same life for $10,000, dated September 13, 1865. The application and answers in the last case were substantially the same as in the present, except that the answer to question 4, "Place and date of birth of the party whose life is to be insured," was "Born New Jersey, 1835"; and the answer to question 5, "Age next birthday," was "Thirty years October 28, as near as I can recollect"; and that immediately preceding the declaration of the correctness of the answers, which was signed by Mrs. France and by Chew, the assured, were inserted the words, "the above is as near correct as I remember." (Record, p. 35, *orig.* pp. 99, 100.)

The jury in the last case found a verdict for defendants. (Record, p. 35, *orig.* p. 100.)

In the present case they found a verdict for plaintiffs, $10,400. (Record, p. 35, *orig.* p. 101.)

On the trial the plaintiffs gave in evidence (Record p. 20) the policy sued on (Record, pp. 26, 27); the application for insurance, dated July 12, 1865, signed by the plaintiff, Lucetta T. France, and by the life insured, Andrew J. Chew (Record, pp. 28, 29); the certificate of the medical examination of Chew, dated same day (Record, pp. 29, 30); two affidavits of Mrs. France, dated June 12, 1872, to the effect that she had an insurable interest in the life of Chew to the amount of $20,000; that the insurance was not a mere gam-

bling or speculative transaction, but that Chew was indebted to her as his sister, and also for moneys loaned to him, and that he had not been out of the limits prescribed by the policy (Record, pp. 30, 31, *orig.* pp. 89, 90); a physician's certificate of the death of Chew from pulmonary consumption (Record, pp. 31, 32, *orig.* p. 91)—these affidavits and certificates having been furnished to defendants as proofs of loss (Record, p. 20, *orig.* p. 61).

It was admitted that Chew died May 25, 1872, and that the premiums had been regularly paid up to his death (Record, p. 20, *orig.* p. 61).

Plaintiffs also gave in evidence (Record, pp. 20, 21, *orig.* p. 61) letter dated Philadelphia, August 22, 1872, from the plaintiff Selvage to the president of the company, defendants, asking payment of the policy (Record, p. 32, *orig.* 92), and the reply thereto, dated Hartford, Conn., August 23, 1872, stating that the papers were in the hands of the adjuster, that the proofs of death were not received till June 15, and that the company were "allowed 90 days from receipt of proof and evidence of death in all cases before payment can be demanded" (Record, p. 32, *orig.* p. 92).

Plaintiffs then closed.

Defendants gave evidence tending to show that Chew, the life insured, at the time of the application and issue of the policy, would have been 37 or at least 35 years old his next birthday, instead of 30, as stated in his application, and that he was born October 28, 1828; that he had been ruptured from infancy, and so continued up to the date of the application and policy, and up to the

time of his death, and that he wore a truss from about 1846, at least up to the time of his death (Record, p. 21, *orig.* p. 62).

Defendants also put in evidence (Record, p. 21, *orig.* p. 62) four affidavits dated June 11, 1872, on the same sheet with and received by defendants with the two affidavits of Mrs. France. These four affidavits were, 1st, to the identity of the party insured (Record, p. 33, *orig.* p. 93); 2d, of the undertaker as to the burial (Record, p. 33, *orig.* p. 94); 3d, of the party who officiated at the interment (Record, p. 33, *orig.* p. 95); and 4th, by the widow of Chew as to his age, in which she swore that he was born October 28, 1828, and on the day of his death was 43 years, 6 months and 27 days old (Record, p. 34, *orig.* p. 96).

Mrs. France denied all knowledge of these four affidavits.

The defendants having closed, the plaintiffs in rebuttal gave in evidence (Record, p. 21, *orig.* 62), assignment to Samuel B. Selvage, dated April 20, 1872, of the policy in question, as collateral security for $2000 (Record p. 34, *orig.* p. 97); and gave evidence to show that Selvage had loaned Mrs. France $2000 on the policy as collateral, and he had taken an assignment of it and taken the policy into his possession; also, that after Chew's death, Mrs. France wished Selvage to buy the policy from her, and an interview took place between him and Mr. Brush, the agent and manager in Philadelphia of the company; the evidence on the part of the plaintiffs was to the effect that Mr. Brush said the money would be paid when due, and that upon the faith

of this, Selvage had paid Mrs. France $7280 for the policy (Record, p. 21, *orig.* pp. 62, 63).

Plaintiffs also gave evidence as to the age and alleged rupture of Chew. Scott, the agent of the company, who took the application, and who was called by plaintiffs, stated that at the time of taking the application, in reference to the date of his birth, Chew had some doubt; that he read the questions over to Chew and then wrote down his answers, and then read the questions and answers all over to him; that he read the list of diseases to him, item by item (Record, p. 21, *orig.* p. 63).

Defendants in sur-rebuttal, called further witnesses as to the age of Chew, and also Mr. Brush, their agent and manager at Philadelphia, who testified that Scott had before the death expressed to him his suspicions in reference to the risk; that at the interview with Selvage, he (Brush) had not told him the money would be paid absolutely; that he might have told him the money would be paid, if the claim was just (Record, p. 21, *orig.* p. 64).

Defendants also put in evidence (Record, p. 21, *orig.* p. 64) note dated June 11, 1872, from Mrs. France to to Mr. Brush: "Would you please be kind enough to transfer A. J. Chew's policy to Mr. Selvage" (Record, p. 34, *orig.* p. 98); and letter dated same day from Brush to the Secretary of the company, enclosing Mrs. France's note, and stating that before the death an assignment had been drawn and signed by Mrs. France.

No evidence was offered or given to show that Chew was indebted to Mrs. France, or that she was in any way dependent on him for support, either in whole or in part.

Both sides having closed, the defendants requested the Court to charge the jury (Record, p. 21, *orig.* p. 64) in answer to 13 points.

The *first three* related to the question of insurable interest to the effect, to wit (Record, pp. 21, 22, *orig.* p. 65) :

1*st.* That if the application and policy were in fact made and taken out by Mrs. France, she must show an insurable interest in Chew's life, and that the mere fact that she was his sister, did not give her such interest.

2*d.* That if at date of application and policy, Mrs. France was a married woman, and no way dependent on Chew for support, either in whole or in part, the mere fact that she was his sister would not give her an insurable interest in his life.

3*d.* That if at date of application and policy, Chew was not indebted to Mrs. France, she had no insurable interest as a creditor in his life under the policy.

The learned judge refused to give the instructions requested, and charged that if Chew was at the time of insurance unmarried and without issue or parent living, the insurance for the benefit of his sister was valid, if the risk insured was truly described in the policy (Record, p. 23, *orig.* p. 68).

The refusal to charge as requested in these three points, and the instruction given as to the insurable interest form the grounds of the first four assignments of error (Record, p. 38, *orig.* pp. 109, 110).

The *fourth* point upon which the defendants requested the Court to charge the jury was, that the answers to the questions in the application are warranties, and if the jury believe that the answers, or any of them,

either in whole or in part were false and untrue, their verdict must be for defendants.

The *fifth and sixth* points were to the effect that if the jury believed that the answers to questions 4 and 5 and 11 respectively in the application were false and untrue, the policy was void.

The *seventh* point was to the effect that if at date of application and policy, Chew was or had been ruptured, he was bound to state the fact, and also how long, and to what extent, and if the jury believed that he was at that date mentioned, or had been ruptured, his answer "None" to question 11 was untrue and false, and their verdict must be for defendants (Record, p. 22, *orig.* p. 66).

The judge having read to the jury the fourth, fifth, sixth and seventh points of the defendants' requests to charge, and the clause of the policy in the words, "It is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers and declaration made by the said Andrew J. Chew and bearing" the date of the policy, "and which are hereby made part and parcel of this policy, as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect, false or fraudulent, then and in such case this policy shall be null and void," instructed the jury as follows:

"This clause of the policy made the answers to the questions part of the respective contracts; and the answers had thus the effect of warranties, and if they were wholly, *or in any material respect*, false or fraudulent, the plaintiff cannot recover. The jury will understand the words 'any material respect' as importing *in*

any respect or degree material to the risk insured, whether as to age, or health, or otherwise howsoever."

With special reference to the question eleventh, whether Andrew J. Chew had ever had any one of twenty diseases mentioned in it, including rupture, and, if so, how long and to what extent, the judge, after reading this question and the answer to the jury, said to them: "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that *the rupture may have been material to any question of the soundness of his health when his life was insured,* or if, at that time, or within any such prior period, he wore a truss *in order that he might repress hernial extrusion,* your verdict should, in either case, be for the defendants. But, though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was, in all this interval, in the habit of working and using bodily exercise, and occasionally dancing, bathing and travelling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; *that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium, and that there was, in this respect, no falsehood or willful suppression; I cannot give the instruction seventhly requested in the absolute form in which it is expressed.*

The judge then gave to the jury the instructions sixthly and seventhly requested, except as previously

explained in respect of the rupture, and without qualification as to any other disease.

As to the instruction fifthly requested, he said: "If the jury believe that the answers to the questions numbered four and five were *materially untrue* as to the age of the said Andrew J. Chew, the policy is void, and the verdict must be for the defendants; and if he was 37 or even 35 years old, the difference was not immaterial. I give the fifth instruction as requested" (Record, pp. 23, 24, *orig.* pp. 69–72).

The refusal to charge as requested in the fourth, fifth, sixth and seventh points, as to the answer to the questions contained in the application, and the qualified instructions given in reference thereto, form the grounds of the fifth to the tenth (both inclusive) assignments of error (Record, pp. 38–40, *orig.* pp. 110–114).

The *eighth*, *ninth* and *tenth*, and *twelfth* points were as follows, to wit:

8. If the jury believe that Selvage did not pay Mrs. France any money on account of policy No. 11,211 after his receipt of the letter of August 23, 1872, from the president of the company, the defendants are not estopped by that letter from denying their liability.

9. If the jury believe that Selvage had loaned $2,000 to Mrs. France, upon the security of an assignment, before the death of Chew, of policy No. 11,211, as collateral, the defendant cannot be estopped by anything alleged to have occurred after Chew's death from denying their liability as to that $2,000.

10. If the jury believe that before Selvage paid Mrs. France the $7,280, Brush, the agent of the company, told Selvage that he had no authority to act, that the

matter was out of his hands, the defendants are not estopped from denying their liability.

12. If the jury believe that before Selvage paid Mrs. France the $7,280, Brush, the agent of the company, told Selvage that the policy (or the monies) would be paid if the claim was a just one, the defendants are not estopped from denying their liability.

(Record, p. 22, *orig.*, pp. 67, 68), and the instructions were given as requested (Record, p. 24, *orig.*, p. 72).

The *eleventh and thirteenth* points were as follows, to wit:

11. That unless the jury believe that Selvage, at the interview with Brush, the agent of the company, fully disclosed to him the purpose and object of his inquiries respecting the policy No. 11,211, the defendants are not estopped from denying their liability by anything that Brush might have said.

13. That unless the jury believe there was an absolute and unqualified assertion by Brush, the agent of the company, that the policy (or the moneys) would be paid absolutely and in any event, and that upon the faith of such an assertion alone Selvage paid the $7,280 to Mrs. France, the defendants are not estopped from denying their liability. (Record, pp. 22, 23, *orig.*, pp. 67, 68.)

The judge gave the 11th instruction as requested, but adding that the word "fully" should be understood as meaning "sufficiently to indicate the purpose and object."

And declining to charge as requested in the 13th point, he instructed the jury "That if Brush was the agent of the defendants to receive the preliminary proofs, and having received them, knew that Selvage was ne-

gotiating with Mrs. France to purchase the policy, and by representing to him that the loss would be paid, induced him to pay to her $7,280 for the assignment of it without fraud on his part, or knowledge by him of the objections now made to its validity, then if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiff's recovery, as have been made on the present trial, the jury may find for the plaintiff, although the objections would otherwise have been fatal. (Record, p. 24, *orig.*, pp. 72, 73.)

The answers to the 11th and 13th points, form the grounds of the 11th, 12th and 13th assignments of error. (Record, p. 40, *orig.*, pp. 114–116.)

It was agreed that the decision of the question involved in the points eight to thirteen (both inclusive), should not be embarrassed by any objection to the party in whose name as plaintiff the suit is brought, or by any objection to legal as distinguished from equitable cognizance of the question. (Record, p. 24, *orig.*, p. 72.)

ASSIGNMENTS OF ERROR.

1. Because the learned judge erred in declining to charge, as requested in defendants' first point, to wit: "If the jury believe that the application for insurance and the policy in question, though nominally in the name of Andrew J. Chew, for the benefit of Lucetta T. France, was in fact made and taken out by said Lucetta T. France for her own benefit, she must show an insurable interest in the life of said Andrew J. Chew before she

can recover, and the mere fact that she was his sister did not give her such insurable interest."

2. Because the learned judge erred in declining to charge, as requested in defendants' second point, to wit: "If the jury believe that at the time the application for insurance was made, and the policy in question issued, Lucetta T. France was a married woman, and in no way dependent upon Andrew J. Chew for her support, either in whole or in part, the mere fact that she was his sister would not give her an insurable interest in his life."

3. Because the learned judge erred in declining to charge, as requested in defendants' third point, to wit: "If the jury believe that at the time the application for insurance was made, and the policy in question issued, Andrew J. Chew was not indebted to Lucetta T. France, then she had no insurable interest as a creditor in the life of said Chew under the policy."

4. Because the learned judge erred in charging the jury that, "If Andrew J. Chew was, at the time of the insurance, unmarried and without issue or parent living, the insurance for the benefit of his sister was valid, if the risk incurred was truly described in the policy."

5. Because the learned judge erred in not charging the jury, as requested in defendants' fourth point, to wit: "That the answers to the questions contained in the application upon which the policy was issued are warranties, and, if the jury believe that such answers, or any of them, either in whole or in part, were false and untrue, their verdict must be for the defendants."

6. Because the learned judge erred in charging the jury, in answer to defendants' fifth point, which was as follows: "If the jury believe that the answers to ques-

tions Nos. 4 and 5 in the applications for insurance, as to the date of birth, and age next birthday, of said Andrew J. Chew, were false and untrue, the policy issued upon the application is void and their verdict must be for defendants," with the added qualification of the word "materially," prefixed to the word "untrue."

7. Because the learned judge, erred in having, after reading to the jury the clause of the policy in the words, "It is also understood and agreed to be the true intent and meaning hereof that if the proposal, answers, and declarations made by the said Andrew J. Chew, and bearing" the date of the policy, "and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then, and in such case, this policy shall be null and void," instructed the jury as follows: "This clause of the policy made the answers to the questions part of the contract, and the answers had thus the effect of warranties, and if they were wholly or in any material respect false or fraudulent, the plaintiff cannot recover. The jury will understand the words 'any material respect' as importing in any respect or degree material to the risk insured, whether as to age or health, or otherwise howsoever," whereas he should have charged that if the answers were wholly or in any respect false or fraudulent, the plaintiff cannot recover, and not have qualified his charge on this branch of the case by the words "any material respect," and "in any respect or degree material to the risk insured."

8. Because the learned judge erred in not charging the jury, as requested in the defendants' sixth point, to

wit, "If the jury believe that the answer to question No. 11 in the application for insurance, 'whether said Andrew J. Chew ever had any of the diseases therein specified, &c.,' was false and untrue as to any one of said diseases, the policy issued upon the application is void, and their verdict must be for defendants."

9. Because the learned judge erred in not charging the jury, as requested in the defendants' seventh point, to wit, 'If at the time when the application for insurance was made, and the policy was issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact, and also how long and to what extent; and if the jury believe that at the time mentioned he was or had been ruptured, his answer, 'None,' to said question No. 11 was untrue and false, and their verdict must be for the defendants."

10. Because the learned judge erred in having, after reading to the jury the eleventh question in the application, and the answer, in the words, "Has the party ever had any of the following diseases? If so, how long, and to what extent? Palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, gout, affection of the brain, dropsy, epilepsy, rupture, convulsions, disease of the heart, insanity, fistula, fits, palpitation, yellow fever, apoplexy, paralysis." "None," charged the jury as follows:

"If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period, that the rupture may have been material to any question of the soundness of his health when his life was insured, or if at that time, or within any such prior period, he wore a

truss, in order that he might repress hernial extrusion, your verdict should, in either case, be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that, from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was, in all this interval, in the habit of working and using bodily exercise, and occasionally dancing, bathing, and travelling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium, and that there was, in this respect, no falsehood or wilful suppression. I cannot give the instruction seventhly requested in the absolute form in which it is expressed."

11. Because the learned judge erred in charging the jury in answer to defendants' eleventh point, which was as follows: "that unless the jury believe that Selvage, at the interview with Brush, the agent of the company, fully disclosed to him the purpose and object of his inquiries respecting the policy No. 11,211, the defendants are not estopped from denying their liability by anything that Brush might have said," with the qualification that the word "fully" in said point "should be understood as meaning sufficiently to indicate the purpose and object."

12. Because the learned judge erred in not charging the jury as requested in defendants' thirteenth point, to

wit, that unless the jury believe there was an absolute and unqualified assertion by Brush, the agent of the company, that the policy (or the moneys) would be paid absolutely and in any event, and that upon the faith of such an assertion alone, Selvage paid the $7,280 to Mrs. France, the defendants are not estopped from denying their liability.

13. Because the learned judge erred in charging the jury as follows: "that if Mr. Brush was the agent of the defendants to receive the preliminary proofs, and, having received them, knew that Mr. Selvage was negotiating with Mrs. France to purchase the policy of July, 1865, and by representing to him that the loss would be paid, induced him to pay to her $7,280 for the assignment of it, without any fraud on his part, or knowledge by him of the objections now made to its validity, then if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiffs' recovery on the policy of July, 1865, as have been made on the present trial, the jury may find a verdict for the plaintiff on this policy, although the objections would otherwise have been fatal."

BRIEF OF ARGUMENT.

I. As to insurable interest—the general question presented by the first four assignments of error.

A mere wagering policy upon the life of another is void: *Franklin Life Ins. Co.* v. *Hazzard*, 41 Ind. Rep., 116 (1872); *Ruse* v. *Mutual Benefit Life Ins. Co.*, 23 N. Y. Rep. (9 Smith), 516 (1861); *American Life and Health Ins. Co.* v. *Robertshaw*, 26 P. S. R. (2 Casey), 189 (1856); *Adams* v. *Penn. Ins. Co.*, 1 Rawle, 97 (1828); *Lord* v. *Dall*, 12 Mass., 118 (1815); *Loomis* v. *Eagle Life Ins. Co.*, 6 Gray, 396 (1856); *Stevens* v. *Warren*, 101 Mass. 564 (1869); 3 Kent. Comm., 368.

To free a policy of life insurance from the objection of being a mere speculative risk or a wagering policy, some interest in the life insured must be shown to exist in the party seeking to recover upon it.

It is the insurable interest in the person who is to receive the benefit of the policy, which is the test, and not the manner in which the insurance is effected, nor the person by whom the premiums are paid. By the terms of the contract these must be paid by the applicant; but whether or not the money was furnished him for the purpose by the person for whose benefit the policy is made, would be known only to the two, and would be beyond the power of the company to prove: *Bevin* v. *Conn. Mut. Life Ins. Co.*, 23 Conn., 244 (1854); *Kennedy* v. *New York Life Ins. Co.*, 10 Louis. Ann., 809 (1855).

This interest may be that of a creditor: *Am. Life and Health Ins. Co.* v. *Robertshaw*, 26 P. S. R. (2 Casey), 189 (1856); *Kennedy* v. *N. Y. Life Ins. Co.*, 10 Louis. Ann., 809 (1855).

But if the interest relied on be that of a creditor, the policy must be reasonably proportioned to the amount of the indebtedness, and will not be good beyond that amount: *Cammack* v. *Lewis*, 15 Wallace, 643 (1872); *Am. Life and Health Ins. Co.* v. *Robertshaw*, 26 P. S. R. (2 Casey), 189 (1856); *Kennedy* v. *New York Life Ins. Co.*, 10 Louis. Ann., 809 (1855), especially opinion of Lea, J. and authorities cited. And see per Sharswood, J. (Supreme Court, Nisi Prius), Philadelphia, in charge to the jury in *Fox* v. *Penn. Mut. Life Ins. Co.*, 4 Bigelow Life and A., Ins. Rep., 458 (1874).

The interest must not be merely colorable and the form in which the insurance is effected or the policy sought to be enforced on behalf of the party claiming its benefit, will not be allowed as a cover for a mere speculative risk: *Stevens* v. *Warren*, 101 Mass., 564 (1869); *Cammack* v. *Lewis*, 15 Wallace, 643 (1872); *Mowry* v. *Home Life Ins. Co.*, 9 R. I., 346 (1874).

An interest in the life of another may be sufficient to support a policy of insurance upon that life, where the party claiming the benefit of the insurance occupies such a relationship to the life insured as that his legal rights, or well-grounded expectations of support or advantage in life will be impaired by the death of the insured.

Such is the case of *Lord* v. *Dall*, 12 Mass., 118 (1815), where an unmarried sister who had lived with

and been supported by her brother, also unmarried, was held to have such an interest in his life, as to take the policy out of the objection of speculation, and to give her the right to recover an insurance designed for her benefit.

It is on this same principle that policies for the benefit of a wife, or children have been sustained. It would be a waste of time to cite authorities in support of such policies; their validity has never been seriously questioned.

But no mere relationship, however close, where neither the law casts a legal obligation upon the insured in respect to the party claiming the benefit of the insurance, nor any circumstances exist to sustain a well-grounded, reasonable and proximate (and not remote or indefinite) expectation that the death of the insured will impair or injuriously directly affect the temporal affairs of the party seeking to enforce the insurance for his own benefit, will of itself suffice to relieve the transaction from the objection of its being a wager.

The proposition is well stated from a reverse point of view, by Shaw, C. J., in *Loomis* v. *Eagle Life Ins. Co.*, 6 Gray, 399 (1856). "All, therefore, which it seems necessary to show in order to take the case out of the objection of being a wager policy is, that the insured has some interest in the life of the *cestui que vie;* that his temporal affairs, his just hopes and well grounded expectations of support, of patronage and advantage in life will be impaired, *so that the real purpose is not a wager, but to secure such advantages supposed to depend on the life of another;* such, we suppose, would be sufficient to prevent it from being regarded as a mere wager."

If this proposition be sound and accurate, the converse must be equally true, that in the absence of any of the requisites set forth, and where the real purpose is merely to secure a sum of money on the death of the insured life,—a speculation on the risk of that death taking place in a longer or a shorter period, the transaction is void as a wager—a gambling adventure.

This affords a true criterion for the determination of cases where the interest alleged is that of relationship, and has been the governing principle in such as have been adjudicated.

Such, for example, as a sister for many years supported by and dependent on her brother, whose life is insured for her benefit, *Lord* v. *Dall*, 12 Mass., 118 (1815); a father, entitled to the earnings of a minor son, whose life is insured for the father's benefit, *Loomis* v. *Eagle Life Ins. Co.*, 6 Gray, 396 (1856); *Mitchell* v. *Union Life Ins. Co.*, 45 Maine, 104 (1858); an adult son in the life of a father, whose death would cast on him the support of his mother and her minor children, *Kane* v. *Reserve Mutual Life Ins. Co.*, 31 Leg. Int. 196 (1874); a woman under contract of marriage, in the life of her intended husband, *Chisholm* v. *National Capital Life Ins. Co.*, 52 Missouri, 213 (1873); a reputed wife treated and supported as such, in the life of the man claimed as and claiming to be her husband, *Equitable Life Assurance Soc.* v. *Paterson*, 41 Ga., 338 (1870); a wife in the life of her husband, *Baker* v. *Union Mutual Life Ins. Co.*, 43 N. Y., 283 (1871).

It is believed that no case can be found where a policy

in favor of the husband on the life of his wife has been sustained on the ground that he had an insurable interest merely as husband. And see 3 Kent Com., 368; Angell on Life and Fire Ins., § 298; Bunyon on Life Ins., 14.

The contract in the present case is to be governed by the law of Connecticut. where the principal office of the company was located. and where it was contemplated that the contract was to be performed. See the policy (Record, p. 7, *orig.*, p. 18). There is nothing to show that the parties had specially in view the law of the place where the contract was made by an agent of the company: *Ruse* v. *Mutual Benefit Life Ins. Co.*, 23 N. Y. (9 Smith) 516 (1861); *St. John* v. *American Mutual Life Ins. Co.*, 2 Duer, 419 (1853).

The law of Connecticut as early as 1797 made wagering contracts void: Gen. Stat. (revision of 1875) title 16, chap. 5, § 1, p. 228:

"*All wagers*, and all contracts and securities whereof the whole or any part of the consideration shall be money or other valuable thing won, laid or betted at any game, horse-race, sport or pastime, and all contracts to repay any money knowingly lent at the time and place of such game, race, sport or pastime to any person so gaming, betting or wagering, or to repay any money lent to any person who shall at such time and place so play, bet or wager, *shall be utterly void.*"

In *Lewis* v. *Phœnix Mutual Life Ins. Co.*, 39 Conn., 100 (1872), it is expressly held that the mere relationship of a brother to a brother, is not such an interest as to support a policy of life insurance.

Wagers involving any immorality or crime, or in conflict with any principle of public policy are void; and a wagering policy is of this class, coming within the latter clause. And policies without interest upon lives are more pernicious and dangerous than any other class of wager policies, because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds: per Selden, J., *Ruse* v. *Mutual Benefit Life Ins. Co.*, 23 N. Y (9 Smith) 516; *Mount* v. *Waite* 7 Johns 434.

If the contract is to be governed by the law of Penna., it is equally true that it is void, if a wagering policy, and to relieve it from that objection, an interest must be shown; and when this interest is not a strict right, or a right derived under a contract, or depending upon a duty imposed by law, but rests on mere expectation or hope, that expectation or hope must be such as to amount to a moral certainty, and not the vain and idle imagination or fancy of a speculative mind. If a policy is effected upon a life under such circumstances as to permit it to be considered as a valued policy, there must not be such over-value as to make it a mere cloak for speculation.

In *Pritchett* v. *Ins. Co. of N. America*, Shippen, C. J., 3 Yeates, 458, 464 (1803), "conveyed the sentiments of the whole Court," in saying, "We have adopted the policy and principles which gave rise to the act of Parliament" [19 Geo. II., c. 37, "which was intended to put an end to insurances without real interest, which in process of time had become a mere cover for gaming contracts."] There cannot be indemnity without loss, nor a loss without an interest. *A policy, therefore, made*

without interest, is a wager policy, and has nothing in common with insurance but name and form." "Every species of gaming contracts wherein the insured, having *no* interest, or a *colorable* one merely, or having a small interest, *much over-values* it in a valued policy, under the cloak of insurances, are reprobated both by our law and usage."

It is true this was a case of marine insurance, but the principle is the same, and is in entire accord with the decision of this Court in *Cammack* v. *Lewis*, 15 Wallace, 643 (1872).

See also *Ellmaker* v. *Franklin Fire Ins. Co.*, 6 Watts & Serg. 439, 445 (1843), that the principles and policy of the English statute of Geo. II. above referred to have been adopted in Pennsylvania.

In *Edgell* v. *McLaughlin*, 6 Whart. 176, 179 (1840), *Pritchett* v. *Ins. Co. of N. America*, was held to be correct in the principle established that "wagers were considered contrary to the genius and policy" of the common law of Pennsylvania. And the language of the Court above referred to is expressly cited with approval: "*Every species of gaming contracts wherein the insured having no interest, or a colorable one merely, or having a small interest much over-valued in a policy, under the cloak of insurances, is reprobated by our law and usage.*" See also *Adams* v. *Penna. Ins. Co.*, 1 Rawle, 97 (1828).

The issuing of the policy upon the repsesentation of Mrs. France that she had an interest, is not even *prima facie* evidence of such interest: *Ruse* v. *Mutual Benefit Life Ins. Co.*, 23 N. Y. (9 Smith), 516.

Even in actions upon marine policies, before the doctrine that wagering policies upon ships are valid had crept in inadvertently, through the case of *Depaba* v. *Ludlow*, Comyns, 361; s. c., 2 Strange, 1250, it was necessary to prove an interest.

Saddlers' Company v. *Badcock*, 2 Atk. 554, and see *Crauford* v. *Hunter*, 8 Term Rep. 14, and the remarks of Selden, J., in delivering the opinion of the Court in *Ruse* v. *Mut. Ben. L. Ins. Co.*, 23 N. Y. (9 Smith) 516, (1861); 1 Parsons' Marine Ins., 158, *note*.

In the present case the sister was a married woman. This appears by the policy (Record, p. 5), and by the Declaration (Record, p. 5, *orig.*, p. 13). It did not in anywise appear, nor was evidence offered to show that there was any interest whatever beyond the mere fact of relationship—any indebtedness—any dependence—any prospective change of circumstances (even the most indefinite or imaginary) on the part of the sister, which would follow the death of the brother whose life was insured for her benefit. It was the baldest kind of a wager, a naked speculation, pure and simple on the part of the sister—a wager on her part for $20,000, if we include both policies, upon the probabilities of the death of her brother. Surely such a contract is against the policy of the law. Yet the court below, in refusing to charge as requested in the defendants' 1st, 2d and 3d points (Record, pp. 21, 22, 23, *orig.*, pp. 65, 68), and saying that "If Andrew J. Chew [the life insured] was, at the time of the insurance, unmarried and without issue or parent living, the insurance for the benefit of his sister was valid, if the risk insured was truly de-

scribed in the policy" (Record, p. 23, *orig.*, p. 69) sustained the contract.

Defendants are at a loss to see, how, unless there is a necessity for the existence of something in the shape of a pecuniary indebtedness, or a prospective loss probable to follow the death of the life insured, in order to such an interest as will free a policy of life insurance from the objection of being a wager, there was any ground for the reference by the judge to the fact that Andrew J. Chew was "unmarried and without issue or parent living." If the mere fact of relationship of brother and sister was sufficient to create an insurable interest, it could make no difference what other relations he had.

Certainly the refusal to answer as requested in defendants' 3d point was clear error, "that if at the time of the application and policy, Chew was not indebted to Mrs. France, then she had no insurable interest *as a creditor* in the life of Chew under the policy" (Record, p. 22, *orig.*, p. 65) was erroneous.

The first four assignments of error have thus been treated together.

II. As to the effect of the answers to the questions contained in the proposal for insurance.

And under this head, so far as the points of law are concerned, the assignments of error, Nos. 5 to 10, both inclusive (Record, pp. 38, 39, *ante*, pp. 19–22), may be considered together. They relate to the effect given to

the statements made by the insured (and which were joined in by the party for whose benefit the insurance was to be made) in reply to the interrogations by the company; and this effect appears in the answers of the judge to the 4th, 5th, 6th and 7th points of plaintiffs in error (Record, p. 22, *orig.*, pp. 65, 66).

The construction of the judge that the statements and answers in the proposal were *warranties* was clearly correct; but the whole effect of that construction was taken away, and the statements and answers reduced to the level of mere representations by the qualifications which the judge appended, and which may be included in one general proposition "that the untruthfulness, falsity or fraudulent character of the statements and answers which would render the policy void, must relate to or consist in something *material to the risk insured.*"

The very recent case of *Jeffries Administrator* v. *Economical Life Ins. Co.* in this court (to appear 22 Wall. 47) would seem to dispose of this branch of the plaintiffs in error's case, almost without the necessity of further argument.

The policy in that case was issued by the company and accepted by the insured and the holder thereof "on the following *express conditions and agreements, which are part of this contract of insurance*:

"1st. That the statements and declarations made in the application for this policy and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured, *affecting the interests of said company.*

"6th. That in case of the violation of the foregoing conditions, or any of them, . . . this policy shall become null and void."

The defence set up by way of plea was, that the statements and declarations were not in all respects true, because 1st, In the application, the insured in answer to a question stated he was a single man, whereas in fact he was a married man. 2d. Because in answer to another question in his application, the insured denied that any application had been made to any other company, whereas, in fact he had made such application and had been insured therein.

The plea was demurred to, and the question was thus raised directly and squarely, whether it was necessary to aver in the plea and prove that the alleged false statements therein set up were material to the risk or whether the plea was bad for want of such averment.

Now what is the present case.

The policy was issued by the company and accepted by the insured, and also by the party for whose benefit it was made, upon the express understanding and agreement "that if the proposal, answers and declaration made by the said Andrew J. Chew, bearing date the 12th day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited and upon the faith of which this agreement is made, shall be found *in any respect false or fraudulent*, then, and in such case, this policy shall be null and void" (Record, p. 6, *orig.*, p. 17).

And in the proposal itself signed by the insured, and also by the party for whose benefit the insurance was

effected: "It is hereby declared that the above *are correct and true answers* to the foregoing questions, and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and *also that any untrue* or fraudulent answers, any suppression of facts in regard to the party's health . . . shall render the policy null and void, and forfeit all payments made thereon" (Record, p. 29, *orig.*, p. 86.)

For easier and more accurate comparison, the conditions, undertakings and agreements in these two cases are here repeated, printed side by side.

Jeffries v. *Ins. Co.*

The policy in that case was issued by the company and accepted by the insured and the holder thereof "on the following *express conditions and agreements, which are part of this contract of insurance.*

"1*st*. That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured *affecting the interests of said company.*

"6*th*. That in case of the violation of the foregoing conditions, or any of them, . . . this policy shall become null and void."

France v. *Ins. Co.*

The policy was issued by the company, and accepted by the insured and the party for whose benefit it was made upon the express understanding and agreement "that if the proposal, answers and declaration made by the said Andrew J. Chew, bearing date the 12th day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then, and in such case, this policy shall be null and void" (Record, p. 6, *orig.*, p. 17).

And in the proposal itself, signed by the insured, and also by the party for whose benefit the insurance was effected, "It is hereby declared that the above *are correct and true answers* to the foregoing questions, and it is understood and agreed by the undersigned, that the above statements shall form the basis of the contract for insurance, and *also that any untrue* or fraudulent answers, any suppression of facts in regard to the party's health . . . shall render the policy null and void, and forfeit all payments made thereon" (Record, p. 29, *orig.*, p. 86).

They are essentially identical. The words in the one policy are in positive affirmation of the truth "*in all respects*" of the statements and declaration in the application; in the present case the words are put from the reverse stand-point,—the falsity "*in any respect,*" or "any" untruthful answers. The "suppression" in the one policy is "of *any* fact relating to the health or circumstances of the insured *affecting the interests of said company;*" in the present case the "suppression" is "*any* suppression of *facts in regard to the party's health.*"

Now this court say in reference to the policy in Jeffries' case, "If the statements are not true, it is agreed that no policy is made by the company, and no policy is accepted by the insured.

"The proposition at the foundation of this point is this; that the statements and declaration made in the policy shall be true.

"This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They may not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression—what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition *to the existence* of a liability on the part of the company."

And this language is equally applicable to the present case. But the judge before whom it was tried left it to the jury to say whether the questions were false or untrue "in any respect material to the risk." This was no part or element of the contract. And it was error to introduce it into the case. The action was upon the contract and the contract alone; upon that the plaintiff was entitled to recover or not at all. Whether wise or unwise, prudent or imprudent for either or both parties, had nothing to do with their rights.

"The right of an individual or corporation to make an unwise bargain, is as complete as that to make a wise bargain. The right to make contracts, carries with it the right to determine what is prudent and wise, what is unwise and imprudent, *and upon that point the judgment of the individual is subject to that of no other tribunal.*" *Jeffries* v. *Ins. Co., ubi sup.*

The court seem in that case to disregard wholly all technicalities arising out of the distinctions between warranties and representations, and to rest upon the plain, simple, broad ground, that where a man undertakes as part of the bargain on his side (that is as part of the consideration—so expressly made in these policies—which he offers for the undertaking to be assumed towards him by the other contracting party) that certain statements and declarations (expressions wholly free from the least shadow of technicality) "*are in all respects true,*" or in the reverse form of expression "*are in any respect false or untrue,*" then and in such case he shall be held to his bargain, and no tribunal,—be it court or

jury,—shall subject his judgment as to the wisdom and prudence of such bargain, or the judgment of the other party as to the importance or materiality of the consideration, to the criterion and determination of its own judgment.

In *Anderson* v. *Fitzgerald*, 4 House of Lords Cases, 484 (1853), all of the judges (eleven in number) were of opinion that it was not necessary for the defendants in an action on a policy of insurance, which was accompanied with a proposal containing a proviso as to the truth of the statements made therein by the insured, very similar to the present case, to prove that the answers were material as well as false.

And they put the case on the ground that the proviso is clearly a part of the express contract between the parties, and *on the non-compliance with the condition stated in the proviso, the policy is unquestionably void.*

They expressly denied that the case turned upon the "well-known distinction between warranties and representations," or "upon the point whether the declaration above-mentioned was either a part of the contract binding between the parties independent of the policy, or meant to be referred to by it. *The proviso is clearly a part of the express contract.*"

It is perhaps not unimportant to note that one of the questions in that case was as to the death of any of the relatives of the insured by consumption or any other pulmonary complaint; and it appeared on the trial that two of his sisters had died of consumption, but at the ages of 67 and 65.

The whole matter is summed up in the words of the Lord Chancellor (CRANWORTH): "Whether certain state-

ments are or are not material where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy."

The term used in this policy was "false," and all the judges, as well as the Lord Chancellor and Lord Brougham, held that this meant the same as "untrue" simply, and did not mean morally false.

But even if we hold in the argument to the technicalities of warranties and representations, and the well-known distinctions between them as to their effects upon a contract of insurance, there was error in submitting to the jury the determination of the question of materiality.

The judge himself admitted, and so told the jury, that the answers to the questions in the proposal were warranties. But the case is yet to be found where, if a man warrants a fact to be true, and on the faith of, and in consideration, in whole or in part, of that warranty, which *ex vi termini* implies an absolute engagement or undertaking, another party enters into a contract with him, the warrantor may raise the question of the materiality of the fact warranted, with a view of defending himself against liability upon the contract. The other

party has seen proper to insist on the warranty; it has been given, and on the faith of, and in consideration of it, the bargain is entered into.

Campbell v. *New Eng. Mut. Life Ins. Co.*, 98 Mass., 381 (1867). "A warranty in insurance, enters into and forms part of the contract itself. It defines, by way of particular stipulation, descriptive condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case, the party seeking his indemnity or payment under the contract must bring his claim, within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects conforming to the terms under which the risk was assumed. *It must be not merely a substantial conformity, but exact and literal; not only in material particulars, but in those that are immaterial as well,*" per Wells, J., in delivering the opinion of the court.

Day v. *Mutual Benefit Life Ins. Co.*, 4 Bigelow L. & A. Ins. Rep., 15, Supreme Court, District of Columbia (1873); *Holabird* v. *Atlantic Mut. L. Ins. Co.*, 2 Dillon, 166, n. (1873); *Miles* v. *Conn. Mut. L. Ins. Co.*, 3 Gray, 580 (1854).

Daniels v. *Hudson River Fire Ins. Co.*, 12 Cushing, 416 (1853). "If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy," per Shaw, C. J., p. 424, in delivering the opinion of the court.

Vose v. *Eagle Life and Health Ins. Co.*, 6 Cush., 42

(1850); *Eddy Street Iron Foundry* v. *Hampden S. & M. Fire Ins. Co.*, 1 Cliff., 300 (1859); *State Mut. Ins. Co.* v. *Arthur*, 30 P. S. R. (6 Casey), 315 (1858); May on Ins., § 156, p. 161.

A representation on the other hand, is such a statement of fact, preliminary to, but not forming part of the contract, as although it be untrue, yet if not material to the risk nor designed to deceive, will not render the contract void. And a misrepresentation "is the statement of something as fact, which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk," per Shaw, C. J., in *Daniels* v. *Hudson River Fire Ins. Co.*, *ubi sup.*

Fitch v. *Am. Popular Life Ins. Co.*, N. Y. Sup. Court (1873), 4 Bigelow L. & A. Rep., 217, 222. "Nor will it do to say that the immateriality of the answers prevents their being warranties. Such construction would do away the distinction between representations and warranties," per Parker, J.

It is not considered needful to elaborate this branch of the argument.

That the judge was correct in his instruction that the answers were warranties, is abundantly shown by the authorities.

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Co., 1 Cliff., 300, 306 (1859). "When the representations of the insured are expressly referred to in the policy as forming a part of the contract they will acquire the character of warranties, and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer."

Miles v. *Conn. Mut. Life Ins. Co.*, 3 Gray, 580 (1854); *Vose* v. *Eagle Life and Health Ins. Co.*, 1 Cush., 42 (1850); *Scales* v. *Scanlan*, 6 Irish Law Rep., 367; *Conover* v. *Mass. Mut. L. Ins. Co.*, 1 Cent. L. J., 597, U. S. C. C. Mo. (1874).

But in another view of the case the judge was in error in submitting it to the jury to find as to the "materiality" of the untruthfulness or falsity of the answers of the assured. The questions and consequently the truth of the answers thereto were made conclusively "material" by the very fact of inquiry being directly and explicitly made upon the respective subjects, without any qualifications as to their "materiality to the risk."

As it is well put in *Campbell* v. *New Eng. Mut. Life Ins. Co.*, 98 Mass., 381 (1868), "The parties may by the frame and contents of the papers, either by putting representations as to the quality, history or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and, when they have done so, the applicant for insurance cannot afterwards be permitted to show that a fact, which the parties have thus declared material to be truly stated to the insurers was in fact immaterial, and thereby

escape from the consequences of making a false answer to such a question," per Gray, J., p. 403, in delivering the opinion of the court, the third time it had come up for review.

See also *Miller* v. *Mut. Ben. Life Ins. Co.*, 31 Iowa, 216, 232 (1871).

And *the truth in all respects* of the answers was made "material" by the parties, not only by the insertion of the distinct and positive questions without qualification or limitation, but by the stipulation that if they should be "*in any respect false*," the policy should be void (Record, p. 6, *orig.*, p. 17).

In respect especially to the judge's answer as to the rupture, the policy is void upon suppression of any facts affecting the health of the insured. And the company have indicated the matters affecting the health by the question they have put. And when the insured suppressed the fact of his having been ruptured, it was the suppression of a fact which the company had by their very interrogatory stipulated for as material.

"Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial." *Jeffries* v. *Life Ins. Co.*, 22 Wall., 47 (1875.)

See *Geach* v. *Ingalls*, 14 M. & W., 95 (1845) where the point was as to the answer to the question whether the applicant had ever had any *spitting of blood*, which was "no," while the proof on the trial showed that about four years before the policy was effected, the assured had spit blood. Lord Denman, C. J., instructed the jury

that it was for them to say whether at the time of making the statement the assured had had *such* a spitting of blood *as would have a tendency to shorten his life.*

A new trial was granted on the ground of this instruction being a misdirection. Pollock, C. B., says, "By the expression 'spitting of blood' is no doubt meant *the disorder* so called, whether proceeding from the lungs, the stomach or any other part of the body; *still, however, one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought therefore to be stated.*"

And Rolfe, B. (afterwards Lord Cranworth, C.) says, "I have no doubt that if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The *fact* should be made known to the office, in order that their medical adviser might make inquiry into its *cause.*"

In *Cazenove* v. *The British Equitable Ins. Co.* (6 Jur. N. S. 826, s. c. 3 Bigelow, L. & A. Ins. Reps., 213, 1860), Pollock, C. B., in delivering the opinion of the Exchequer Chamber, affirming the judgment of the Common Pleas, says, "It is trifling to say that it is a true answer, if something more is to be added to make it true."

In *Fitch* v. *Am. Popular Life Ins. Co.*, N. Y. Sup. Ct., 1873, 4 Bigelow L. & A. Ins. Reps. 217, it was held to be error to instruct the jury that "if they believe that Fitch [the insured] had had any disease of his eyes, *such as to require care or attention*, no recovery can be had;" when the question was, Whether he ever had any illness, local disease, or any injury to any

organ," and the answer was "No." The answers in this case were held to be warranties, and the evidence showed that the insured, about six years before the application, had had a disease of the eyes.

And see *Brennan* v. *Security Life Ins. &c. Co.*, 4 Daly (C. P., of N. Y., 1872), 296; *Frost* v. *Ætna Ins. Co.*, Idem, 285. This last case was upon a policy of the present defendants, in like form with that now in controversy.

That the question No. 11, with reference to "rupture," and other specified diseases, meant exactly what its words imply: "Has the party *ever had* any of the following diseases? (Record, p. 28, *orig.*, 84, *ante*, p. 2), is further apparent from the next question, No. 12: "Is the party subject to *habitual* cough, dyspepsia, diarrhœa, dysentery, rheumatism, colic?" no one of which is mentioned in question No. 11; thus clearly demonstrating that, as to certain specified diseases, the company considered it material that they should know the fact if the party "*had ever had*" any or either of them (and the list of diseases was read over "to him item by item" at the time he made the answers. (Record, p. 21, *orig.*, p. 63); while in regard to a certain other class of specified diseases, they considered it material only to know whether the party was "subject" to them habitually. And this is the expression of the one party as to what is to be considered material, and assented to and binding on the other.

It was of importance that the company should have been informed of the fact that Chew had been ruptured, in order that inquiry could be made as to its nature and extent. There is no doubt that he had been rup-

tured. Not only was evidence given by the defendants tending to show the fact (Record, p. 21, *orig.*, 62), but the judge treated the fact as so in his answer to defendants' 6th point (Record, p. 23, *orig.*, 70, 71), but added qualifications as to the time of the rupture being "*at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured*" (Record, p. 23, *orig.*, p. 70, *ante*, p. 15).

The defendants' 7th point (Record, p. 22, *orig.*, 66) was phrased to meet the view of the answer involving concealment or "*supprssion*" of a fact "*in regard to the party's health*," as provided for in the declaration which is part of the proposal (Record, p. 29, *orig.*, p. 86). But without adverting to this provision, the judge qualified his answers to both 6th and 7th points, by leaving it to the jury on the question of materiality.

So too in regard to age. The judge qualified his answer to defendants' 5th point (Record, p. 22, *orig.*, p. 66) by introducing the phrase "materially untrue" as applied to the answers of the insured to questions 4 and 5 as to his age (Record, p. 23, *orig.*, p. 72). This qualification is not helped by the instruction that "if he was 37 or even 35 years old, the difference was not immaterial" (Record, p. 24, *orig.*, p. 72). This left the jury to determine the question of materiality of any mistatement involved in any discrepancy of age whatever under 5 years.

A reference to the brief of the counsel for the plaintiffs in error in *Jeffries* v. *Life Ins. Co.*, 22 Wall., 47

(1875), will show that Judge Cadwalader's charge in this present case, as reported in 2 Ins. Law. Journ., p. 657, was cited by them as an authority to show that the materiality of the answers to specific questions in an application, must be left to the jury. But the citation does not seem to have weighed with this Court.

It may be mentioned in this connection, that the materiality of a discrepancy in age as stated by the applicant, and the actual fact, is not to be measured pecuniarily by the mere difference of the amount of premiums required for the one age, or the other during the years of the life of the policy. In this case that difference would have been but $487 02. But the materiality in an actual pecuniary point of view is to be measured by ascertaining what amount of insurance the premium actually paid would have secured, had the age been truly stated; and at 37 this by a simple calculation is $8089 70, instead of $10,000.

III. As to the alleged waiver of the objections which, if proved, would render the policy void.

If the judge was right in his instructions which relate specifically to these objections, and have been the subject of the argument thus far, the jury could have found for the plaintiffs without any reference to the questions presented as to Selvage's position in the matter. It was agreed that these questions should not be embarrassed by any objection to the party in whose name the suit was brought, or to legal as distinguished from equitable cognizance of the question (Record, p. 24, *orig.*, p.

72). But there is nothing to show on which of the two branches into which the case as left to the jury may be considered as dividing itself, the jury based their verdict, or whether it was not based upon both. The fact that the verdict in the other case was for the defendants (Record, p. 35, *orig.*, p. 100) proves nothing in this regard, although that case was free from any question as to waiver. So far as any inference can be drawn from the fact of the different results in the two cases, which were tried together before the same jury, it would rather be that the difference was the result of a compromise, the amount of each policy being the same.

But conceding, for the sake of argument, that the verdict of the jury was based on the alleged waiver, as to Selvage, of the objections as respects the present policy, the instructions of the judge so far as they allowed any effect to such alleged waiver were, it is submitted, erroneous.

The instructions requested were (Record, p. 22, *orig.*, p. 68): "11. That unless the jury believe that Selvage, at the interview with Brush, the agent of the company, fully disclosed to him the purpose and object of his inquiries, the defendants are not estopped from denying their liability by anything that Brush might have said;" and "13. That unless the jury believe there was an absolute and unqualified assertion by Brush, the agent of the company, that the policy or the moneys would be paid absolutely and in any event, and that upon the faith of such an assertion alone Selvage paid the $7280 to Mrs. France, the defendants are not estopped from denying their liability."

The judge gave the 11th instruction as requested, but

with the qualification that the word "fully" should be understood as meaning "sufficiently to indicate the purpose and object;" and then, declining to instruct as requested in the 13th point, charged, "that if Mr. Brush was the agent of the defendants to receive the preliminary proofs, and having received them, knew that Selvage was negotiating with Mrs. France to purchase the policy of July, 1865, and by representing to him that the loss would be paid, induced him to pay to her $7,280 for the assignment of it without any fraud on his part, or knowledge by him of the objections now made to its validity, then if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiff's recovery on the policy of July, 1865, as have been made on the present trial, the jury may find a verdict for the plaintiff on this policy, although the objections would otherwise have been fatal." (Record, p. 24, *orig.*, p. 72.)

There was error in several respects in the charge thus given.

Conceding in general terms that a waiver can be made of the conditions of a policy, or of forfeiture, such waiver can only bind when made with full knowledge of the facts. Its effect is that of an *estoppel in pais;* and the authorities are clear that a party will not be estopped unless his conduct or declarations, which are relied on to constitute the estoppel, have been with full knowledge of the facts, otherwise the doctrine would open the door to the grossest frauds.

Mackey v. *Holland*, 4 Metcalf, 69; *Whitaker* v. *Williams*, 20 Conn., 98; *Dyer* v. *Coy*, id. 568; *Stelle* v. *Putney*, 3 Shepley, 327.

Particularly is this the case when the alleged admission, whether arising from declarations or conduct, is really a promise that something shall be done in the future.

Mackey v. *Holland, ubi sup.*, "The present case shows that the defendant at the time of making the admission of his liability to pay this note [it was in the form of a promise that the note would be paid], *was ignorant of the facts then existing which would have constituted a good defence;* and this removes all suggestions of fraudulent misrepresentation, or wilful suppression or concealment of the truth, on his part."

In *Reynolds* v. *Mut. Life Ins. Co.*, 34 Md., 280, 289, it was held that the acceptance by a mutual insurance company of the interest upon a premium note, the liability of the maker of which was gone by reason of his discharge as an insolvent, did not revive the liability of the company upon the policy, the interest having been received by them in ignorance of the discharge in insolvency.

The principle is well settled that a party will not be held to have waived his rights, or to be estopped by his conduct and acts, unless it is shown that he has acted with full knowledge of all the facts affecting his rights. *Reynolds* v. *Mut. Fire Ins. Co.*, 34 Md., 280, 289; *Ijams* v. *Hoffman*, 1 Md., 437, 438; *Gray* v. *Murray*, 3 Johns. Chan. Rep., 188; *Bennett* v. *Colley*, 2 Myl. & Keene, 225; *Howard* v. *Carpenter*, 11 Md., 279; *Flagg* v. *Mann*, 2 Sumner, 563.

"It can never be maintained that the acquiescence of a party, under ignorance of his rights, operates as a waiver of any claim, or as a confirmation of anything

done against him. Neither can it be seriously contended that the proof of ignorance, or want of notice, lies in the party against whom such acquiescence is alleged." *Bennett* v. *Colley*, *ubi sup.*, p. 232, per Brougham, Lord Chan.

Now, in the present case the judge said nothing whatever as to any knowledge by Brush of the facts which had rendered the policy void at the time of the alleged waiver, but by the strongest implication put it to the jury that such knowledge was not an element to be considered by them. There was no evidence of any such knowledge.

But further, and more directly to the positive instructions given by the judge. Equitable estoppel results in the truth being forbidden to be given in evidence, or if in evidence, to be allowed to have any effect to which it otherwise would be rightfully entitled; and therefore it requires that the alleged admission or conduct must be not only with the fullest knowledge of the facts which would make a defence, but also with the fullest disclosure and knowledge of the purpose and intent of the other party in seeking or relying upon the admission or conduct.

Howard v. *Hudson*, 2 Ellis & Blackburn, 1; *Foster* v. *Glen Marten Life Assurance Co.*, 3 id. 48; *Cambridge Institution* v. *Littlefield*, 6 Cushing, 210.

And an admission will not take effect as an absolute estoppel unless it is made with full knowledge of the right to be estopped, and with the design or effect of creating an impression that it does not exist, or will not be enforced. *Whitaker* v. *Williams*, 20 Conn., 98; *Dyer* v. *Coy*, id. 568; *Stelle* v. *Putney*, 3 Shepley, 327.

The party setting up the bar of an equitable estoppel to the reception of the truth, must show *both* that there was a wilful intent to make him act on the faith of the representation, and that he did so act; the failure of either of these ingredients is fatal to the setting up of an estoppel. *Howard* v. *Hudson*, 2 Ellis & Blackburn, 1.

The waiver alleged to be relied on must be such as the party is *justified* in relying upon. Thus a party is not excusable, as a prudent man, in delaying to sue where the contract provides a limitation of time within which suit must be brought upon it, in reliance upon a simple promise not to insist upon the limitation clause. See *Odiorne* v. *New Eng. Mut. Marine Ins. Co.*, 101 Mass., 551; *Ketchum* v. *Protection Ins. Co.*, 1 Allen (N. B.), 136; *Lampkin* v. *Western Assur. Co.*., 13 Up. Can. Q. B., 237.

Such a waiver is rather to be regarded in the light of a new contract, which requires a consideration to support it. And this seems to be the true ground of the numerous decisions upon the question of waiver of forfeiture for non-payment of premiums according to the terms of the contract, by receipt of the premium after failure to pay according to those terms. In these cases the forfeiture was strictly such by reason of a failure to comply with some subsequent condition; and the forfeiture was not of some absolute right of property, but merely of the right by the payment of a stipulated consideration, to renew the contract from year to year. The consideration included in the premium on a policy

of insurance for life or for a term of years is two-fold; first, so much as suffices to insure the party for the specific year in which the premium is paid; and second, so much as gives him the right upon the payment of the same sum, to continue or renew the contract from year to year upon the same terms. See this well-reasoned by Carpenter, J., in *Worthington* v. *Charter Oak Life Ins. Co.*, 41 Conn., 372 (1874).

The contract in nearly all the cases where the forfeiture has been held to be waived has been valid in its inception; but something has occurred subsequently by which under its terms it was subject to be avoided. All the cases of forfeiture of life insurance policies on the ground of non-payment of premiums according to the stipulations of the policy, are of this character. So in cases of policies of fire insurance, the forfeiture has been from something subsequently occurring, such as a change in the use of the building by which the risk was increased, or the like. The few exceptions will be found on examination to have some special features which distinguish them, or the waiver has consisted in the receipt of premiums after the act by which the policy might be considered as void has become known to the company, and where there was a consideration for the renewal or revival of a contract tantamount to a new contract, or a new *consensus* of the parties to the agreement.

And this view renders perfectly reconcileable the cases in which the term "void" has been construed to mean "voidable."

Atlantic Fire Ins. Co. v. *Goodall*, 35 N. H., 328; *North Berwick Co.* v. *Ins. Co.*, 52 Me., 336; *Viall* v. *Genesee*

Mut. Fire Ins. Co., 19 Barb., 440; *Viele* v. *Germania Fire Ins. Co.*, 26 Iowa, 9; *Frost* v. *Saratoga Mut. Fire Ins. Co.*, 5 Denio, 154; *Cartwright* v. *Gardner*, 5 Cush., 273.

And which have been rested in great measure upon the analogy to cases between landlord and tenant, where by the terms of the lease, certain acts upon the part of the latter are to render the instrument void; but where the receipt of rent by the landlord after the forfeiture has been held to be a waiver; in these cases also, there is the element of a consideration for the renewal of the contract; for such it is in fact, rather than a revival or continuance of the old one.

But no case it is believed can be produced, where the contract by its terms is void by reason of some state of things existing at the time of its inception, and consequently where there was in fact no contract, and where a loss has occurred or the time for fulfilment has arrived, and a mere declaration or promise has been held to be a waiver of the right to deny the existence of the contract or an admission of liability upon it, especially when such declaration or promise has been made in ignorance of the existence of the facts which rendered it null and void, or more accurately speaking, would show that there never had been any contract. And that is just the present case.

If the root principle which seems to underlie the decision in *Jeffries* v. *Ins. Co.*, 22 Wall., 47, that words are to be taken in their common and obvious and ordinary sense, and to express just what the parties have said, is to prevail, there certainly can be no room in the present case to construe the word "void" as meaning "voidable" only, that is at the option of the company.

It is indispensable for a party who sets up an estoppel by way of defence to an otherwise clear liability, to prove affirmatively with a certainty to every intent, and beyond a doubt, and not by way of argument or inference, the facts relied on to constitute the estoppel. Co. Litt. 352 b; *Hill* v. *Epley*, 31 P. S. R. (7 Casey), 331.

And see as to the general doctrines of estoppel, 2 Smith's Leading Cases, Hare & Wallace's Notes, 6th edition, 702–706.

Further, there was error in the charge of the judge in instructing the jury in effect that Brush as the agent of the company had authority to waive the objections (Record, p. 24, *orig.*, p. 72). There was no evidence as to the extent of Brush's authority, and under the authorities such a waiver cannot be held to have been within the scope of his powers. The letter of the President of the Company (Record, p. 32, *orig.*, p. 92), put in evidence by plaintiffs (Record, p. 20, *orig.*, p. 61), shows that Brush had forwarded the proofs to the company within a day or two after they had been handed to him, and that they had been placed in the hands of the adjuster. Thus as regards the preliminary proofs, Brush's duty it appears was simply to receive and transmit them, not to act upon or judge of them in any way. There was nothing in the evidence to justify even an inference that it was within the scope of his authority to promise absolutely that the policy would be paid, without regard to any fraud which might exist relieving the company from liability.

It is a very different case from those in which the agent has waived the strict terms of the policy in regard

to the time of payment of the premiums. It is part of his duty to receive the premiums, but it is no part of his duty to determine the sufficiency of the preliminary proofs, or by a naked promise that the policy would be paid, to fix an absolute liability upon the company without regard to the existence of unknown frauds which had rendered the policy void from its very inception.

And in the present case, in the light of the preceding argument, the authority thus accorded to Brush is in effect an authority to make an insurance after a loss has occurred, and this has never been held within the scope of the powers of any agent. *Bentley* v. *Columbia Fire Ins. Co.*, 17 N. Y. Rep., 421.

"The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this is doubly true where the agent was not a party to these occurrences." *Ins. Co.* v. *Mahone*, 21 Wall., 152, 157 (1874); and see *Packet Co.* v *Clough*, 20 Wall., 528 (1874).

An estoppel, however, will not in any case be carried further than is necessary to prevent one party from being injured by his reliance upon the acts or declarations of the other, and will apply only to so much of the alleged injury as is the direct result of the act or declaration relied on. *Miller* v. *Cresson*, 5 Watts & Serg., 284; *Kenney* v. *Farnsworth*, 17 Conn. 345. And this rule will hold good in every instance in which an admission is relied on as an estoppel, and the estoppel will be limited to what is necessary to put the parties in the same relative position which they would have occupied had the admission not been made. *Bursley* v. *Hamilton*, 15 Pick., 32.

Clearly, therefore, even in the event of it being held that there was such an authorized admission by Brush, the agent of the company as to amount to an estoppel, it can only avail to the extent of the injury. And this injury could not exceed the amount paid by Selvage in alleged reliance upon the admission or promise. He had loaned $2000 on the policy as collateral, a year before the death of Chew (Record, p. 21, *orig.*, p. 63), and taken an assignment of it to that amount. And the instruction in answer to defendants' 9th point (Record, p. 22, *orig.*, p. 67), which was given as requested (Record, p. 24, *orig.*, p. 72): "If the jury believe that Selvage had loaned $2000 to Mrs. France upon the security of an assignment, before the death of Chew, of Policy No. 11,211 as collateral, the defendants cannot be estopped by anything alleged to have occurred after Chew's death from denying their liability as to that $2000," shows that the extent of any injury alleged to have arisen by reason of the admission or promise of Brush, could not have included that sum.

And the very fact that the jury found in this case for the full amount of the policy shows the correctness of the argument (*ante*, p. 48) that the verdict of the jury cannot, from the fact that their verdict in the other case was for defendants, be inferred to have been given in this case upon the ground of the alleged estoppel alone; but rather that the result as a whole in the two cases, was grounded upon a compromise.

The instructions requested in defendants' 13th point (Record, p. 22, *orig.*, p. 68) should have been given in

its very terms, for unless the alleged admission of liability or promise that the monies would be paid was "absolute and *unqualified*," there must have been some "qualification;" and then it was in any aspect of the interview between Brush and Selvage, the latter's own risk if he chose to take the chance of the "qualification" turning out to be without effect. Now there was evidence that the promise, if made, was not an absolute and unqualified one. Brush testified (Record, p. 21, *orig.*, p. 44) that he had not told Selvage the money would be paid absolutely; "that he might have said that the money would be paid if the claim was a just one." And this, in the light of his further testimony (Record, ibid.), that Scott, before the loss, "had expressed to him his suspicions in reference to the risk," renders it much more probable that whatever Brush did say, amounted to no more than an assertion of the responsibility and promptness of the company, and not of its absolute liability. But the declining to give the instruction asked, left it to the jury to find against the defendants on the question of estoppel, no matter how or how much the admission or promise to pay was qualified.

In the light of the principles of law and authorities adduced, there was clear error in the manner in which the case was left to the jury on the question of waiver or estoppel. This question turned upon alleged declarations only, and these declarations made by an agent, and if absolute and unqualified, then beyond the scope of his authority, unless this court is prepared to say that an agent to receive and forward the preliminary proofs, is, in effect the company itself. But, conceding for sake

of argument, that the declarations were made and that the agent had authority, still the jury were so instructed as to their operation, that they could find against the defendants upon the ground of waiver or estoppel, without regard to the presence or absence of certain absolutely essential elements, and in such a form as was calculated to mislead them.

Under the instructions as given, the jury could have found their verdict on this ground, notwithstanding the declaration relied on was a mere promissory one; and though they might have believed it to be qualified (and without limit to the extent of the qualification so believed); and though they might have believed that the facts which were afterward set up by way of defence, were not known to Brush at the time of the alleged declarations; and though they might have believed that there was no "wilful intent to make him [Selvage] act on the faith of the representation," *Howard* v. *Hudson*, 2 Ellis & Blackburn, 1; and no full knowledge of the right to be estopped, and no full disclosure and knowledge of the purpose and intent of Selvage in seeking or relying upon the declaration.

The result of the instructions as given, was that the jury were allowed in considering this branch of the case, to shut out upon inference all the truth as developed under the other branch. "It is indispensable for a party who sets up estoppel, to prove affirmatively *with a certainty to every intent, and beyond a doubt*, and not by way of argument or inference, the facts relied on to constitute the estoppel." Co. Litt., 352 b; *Hill* v. *Epley*, 31 P. S. R. (7 Casey) 331. And the jury should have been so distinctly instructed.

This disposes of the remaining assignments of error, 11th, 12th and 13th (Record, p. 40, *orig.*, p. 115).

The judgment it is respectfully submitted, should be reversed; and the defendants allowed the oppportunity of establishing their defence before another jury under correct instructions as to the law.

SAMUEL C. PERKINS,
Of counsel for plaintiffs in error.

IN THE

Supreme Court of the United States,

No. 132. October Term, 1875.

The ÆTNA LIFE INSURANCE COMPANY, of Hartford, Connecticut,

Plaintiff in Error,

vs.

DAVID FRANCE and LUCETTA T., his wife, in right of the said LUCETTA, to the use of SAMUEL B. SELVAGE.

BRIEF OF DEFENDANTS IN ERROR.

NATHAN H. SHARPLESS,
Of Counsel with Defendants in Error.

In the Supreme Court of the United States.

No. 132. October Term, 1875.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Plaintiffs in Error and Defendants below,

v.

DAVID FRANCE and LUCETTA T., his wife to the use of the said LUCETTA, to the use of SAMUEL B. SELVAGE.

BRIEF OF DEFENDANTS IN ERROR.

The plaintiffs in error make three points against the verdict and judgment below:

1. The alleged want of insurable interest in the plaintiff, Luce'ta.

2. The alleged misdirection as to the supposed warranties in relation to age and rupture, and

3. The alleged misdirection as to the estoppel upon the defendants set up by the plaintiff, Samuel B. Selvage.

1. As to the alleged want of insurable interest in the Plaintiff, Lucetta,

a. As plaintiffs in error seem to think it material it may be first necessary to inquire where the contract in this case was actually made. The application was made in Philadelphia to the manager and agent (R., p. 28) of the defendants corporation and by the express terms of the policy (R., p. 27) it was not to be valid until countersigned by the same person in Philadelphia, nor (R., p. 29) until the premium was paid to the agent.

It would seem therefore, that the law of Pennsylvania was the *lex loci contractus*. That a contract made in one place to acquire validity only and be performed in another place is governed by the law of the latter place; see learned opinion of McKennan, Circuit Judge, In re Peter Conrad, a Bankrupt, 8th Philadelphia Reports, p. 147. See also Pamphlet Laws of Pennsylvania, 1856, p. 284, as to agents of foreign insurance companies transacting business in Pennsylvania.

b. But the policy in this case was one in which the risk insured his own life (R. p. 26), and the declaration second count (R. pp. 8–9), on which there is a verdict and judgment, avers that he insured himself and that he paid the premiums, and as to this count at least, which was not demurred to nor was a motion made to arrest the judgment thereon, the interest of the plaintiff Lucetta was immaterial.

"A person has undoubtedly an insurable interest in his own life and that interest supports a policy whether he makes the loss payable to himself, his executors, or his assigns, or to a nominee or appointee named in the policy." Bliss on Life Insurance, pp. 34–35, citing many American cases.

c. But any sister has an insurable interest in the life of her brother, and the learned judge below was even more cautious on this point than he need have been. In Campbell *v.* The New England Mutual Life Insurance Company, 98th Massachusetts Reports, p. 381 (a case greatly relied on by the plaintiffs in error), it is directly ruled that an insurance made by a man on his own life for the benefit of his sister-in-law was valid, without proof of other insurable interest in the beneficiary : and to the same point is the ruling in Lord *v.* Dall, 12th Massachusetts, p. 115, cited in support of the same rule laid down in Bliss on Life Insurance, p. 33.

d. So that in any event upon the second count in her declaration the plaintiff was entitled to a verdict, and

the instructions of the learned judge, whether right or wrong, upon the issue tendered on that count, were immaterial. The allegation of the defendants, that a policy in the name of the assured cannot be made the cover for a mere wager, is nothing to the purpose; the contract was regular upon its face and upon the pleadings, and the bill of exceptions shows no evidence which would have warranted the judge in submitting the question of its being a mere wager to the jury.

2. The alleged misdirection as to the supposed warranties in relation to age and rupture.

a. Warranties, especially when their breach works, as in this case, a forfeiture of all previous payments (R., pp. 27–29), are to be construed strictly. The complaint of the plaintiffs in error is, that in an answer to question eleven, in the application (R., p. 28), as to whether "the party ever had any of the following diseases? If so, how long, and to what extent?" naming palsy, dropsy, &c., in all twenty complaints, among which was rupture, that the applicant falsely answered "none," when they allege that in point of fact he had been ruptured from his infancy. The first question that arises is, whether rupture is a disease at all, whether it is not rather an affliction, or an infirmity; but let it be a disease, and granted that there is a warranty as to it, still the warranty is certainly to receive a reasonable construction; it is not to be supposed that when the applicant denied that he had ever spit blood, or had the disease of spitting blood, that he intended to deny that he had ever had a tooth drawn, or that when he denied that he had ever had disease of the lungs, he meant or was understood to assert that he had never had a cold, the effects of which had extended to them. The learned judge distinctly told the jury (Record, p. 23) that the answers to the questions were part of the respective contracts; "and the answers had thus the effect of warranties, and if they were wholly, or in any

material respect, false or fraudulent, the plaintiff cannot recover. The jury will understand the words any 'material respect,' as imputing in any respect or degree material to the risk insured, whether as to age or health, or otherwise howsoever." And again on the same page lower down, the learned judge charged the jury that if there was "in this respect no falsehood or wilful suppression he could not give the instructions severally requested in the absolute form in which it was expressed." The defendants, dissatisfied with these instructions, demanded an absolute affirmance of their sixth and seventh points, that if the applicant had at any time been ruptured, no matter to how slight an extent, nor how complete had been his recovery, they were entitled to an absolute direction for a verdict, and to a forfeiture of all the premiums, some $1700 paid. When we consider the great number of insurances on lives which have been made in the last few years through agents or solicitors sent out by these companies, who usually fill up the applications on the one hand, but are entirely indifferent to anything in the case, but obtaining their own commissions from their employers, on the other; and the vast amount of premiums received by the insurers on such risks often from ignorant and helpless people, who generally rely on the stereotyped assertion of the agent, "that all that is necessary is to pass the doctor and pay the premium;" the result of such rulings as are demanded by the defendants here, are simply horrible to contemplate. The insured are delivered over to the companies, like the lamb to the wolf, *ad devorandum.*

But this whole matter is thoroughly understood by this court. Opinion of Mr. Justice Miller in Insurance Company *v.* Wilkinson, 13th Wallace, p. 222. And the instructions of the learned judge below, in the modified form in which they were given, were entirely in accordance with the doctrines on the same point, laid down by Mr. Justice Strong, in the Life Insurance Company *v.* Francisco, 17 Wallace, pp. 672, 80.

b. But when we come to look further into this matter, we find, that not only for the cogent reasons which he gives, but for another, and very conclusive one, he was justified in refusing to give the 6th and 7th instructions as requested. This case (Record, p. 35) was tried in connection with another one, in which Mr. and Mrs. France were plaintiffs and the same company the defendants, on another policy for $10,000, dated 13th day of September, 1865, on the same life, payable to Mrs. France; the two cases were before the same jury, on the same evidence, and the points in the record were handed to the judge, and the same instructions demanded in both cases, but the applicant refused to sign the application on this last policy, without it was expressly inserted that the age was only given as near as he could recollect, and at the foot of the application he inserted the words "The above is as near correct as I remember," the effect of which clearly was, so far as this last policy was concerned, to restrict the warranty to the best of the memory of the applicant at the time of the application (Bliss on Life Insurance, pp. 75 and 76), so that if the learned judge had affirmed the two points Nos. 6 and 7, as applicable to the second policy, it would have been clearly error, and the defendants asked him to make no distinction in the cases. And now we perceive, both on the point of age and rupture, that though the applicant told the defendants' agent, Scott, at the time of the first application, that he was uncertain as to his age (Record, p. 21), and Scott, in whose handwriting the application was, set the age down as an absolute statement (R., p. 28), yet two months afterward the defendants received another application from the same party, in which he refused to speak positively either as to his age, or in regard to any other matter or thing in the application, and they took seven annual premiums from him thereafter, without further inquiry, or making any complaint as to the application on the first insurance. Such conduct, in keeping silence when they should have spoken, if they ever intended to speak, ought to estop

them altogether upon this alleged defence on the questions of age and rupture, and the learned judge's charge was far too favorable to these thankless defendants. It comes with a very bad grace from litigants who have disturbed the judicial mind by putting points to a judge which he ought to have wholly refused, to complain of instructions that he could not absolutely affirm them.

3d. The alleged misdirection as to the estoppel upon the defendants set up by the plaintiff, Samuel B. Selvage.

a. Selvage having loaned Mrs. France $2,000 on this policy prior to the death of the applicant; upon that event occurring, and after the furnishing of the preliminary proofs, called on the resident manager, Mr. Brush, who told him the money would be paid at the expiration of the ninety days, whereupon, *on the faith of this*, he paid Mrs. France $7,280 more, making in all $9,280 for the policy. On this state of facts the learned judge charged the jury (R , p. 24), " that if Mr. Brush was the agent of the defendants to receive the preliminary proofs, and having received them, knew that Mr. Selvage was negotiating with Mrs. France to purchase the policy of July, 1865, and by representing to him that the loss would be paid, induced him to pay to her $7,280 for the assignment of it, without any fraud on his part or knowledge by him of the objections now made to its validity, then, if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiff's recovery on the policy of July, 1865, as have been made on the present trial, the jury may find a verdict for the plaintiff on this policy, although the objections would otherwise have been fatal."

On the evidence, what could the learned judge have said less favorable to the plaintiff, Selvage, which would not have been erroneous ? Brush had been examined by the defendants, and had not denied his power to waive

the alleged defence, and the jury, under the foregoing instruction, have found, upon competent evidence, that he did waive it. Moreover, this "agent" was not a mere receiver of application for insurance—he was a resident manager, and under the Act of 1856 (supra) could only open an office in Pennsylvania for this company on filing a bond, and a certified copy of a resolution of the Board of Directors authorizing him to respond to the legal process, &c., for the company.

We have then the case of the equitable plaintiff purchasing this policy on the faith of "positive acts" of encouragement of the defendants, and this after they were in possession of the preliminary proofs of death, &c., which had been obtained by themselves (R., p. 21). The later cases and especially those in the Supreme Court of Pennsylvania, the *locus contracti* in this case seemed to clearly establish the doctrine, that such conduct estops the defendants.

In Maple *v.* Kussart, 3 P. F. Smith, p. 348, a widow who had herself an estate in fee in certain land, sold by the order of an Orphans' Court as the property of her deceased husband, and who had, in entire ignorance of her own title, encouraged the purchaser to bid at said sale, was held to be estopped by such conduct from asserting her own superior title, although it appeared in the deed under which the defendants claimed. Mr. Justice Strong, in delivering the opinion of the court, says, on p. 351, it is manifest that all parties at that time (*i. e.*, the time of the Orphans' Court sale) thought the land belonged to the estate of the deceased testator. Not only was it sold as a part of his estate, but it was bought as such, even the widow herself being under that impression. The proof is that she urged the purchaser to buy that the property might remain in the family, &c. And again, on p. 352, "silence alone will not postpone unless in cases where it is a fraud; the positive acts of encouragement bar the assertion of a right, even though they were done

with no fraudulent intent; nor does it make any difference that the purchaser might have discovered he would acquire no title by his purchase had he made diligent inquiry. He has been put off his guard, and induced, perhaps, to make no inquiry by the words of encouragement he has received."

"Positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are a good ground of estoppel, and ignorance of title on the part of him who is estopped will not excuse his act." Agnew, J., in Chapman *v.* Chapman, 9 P. F. Smith, pp. 214, 218, citing several cases. S. P., same judge, Lawrence *v.* Luhr, 15 P. F. Smith, p. 236.

The foregoing cases are cited as correct enunciations of the law in Bigelow on Estoppel, pp. 501–2.

Finally, upon the whole case, it is respectfully submitted that the defendants in error are entitled to hold their verdict upon the ground that it appears clearly to the judicial mind of the court that it is founded upon the estoppel set up by the plaintiff, Selvage, as to which the evidence was clear, and the charge of the court unimpeachable.

This must have been so, for in the other case where the warranties were only as to the best of the memory of the applicant, as to the same facts, the jury found for the defendants. The error of the learned judge then, in the charge, if any, as to the age and rupture of the applicant were immaterial.

It is the business of the plaintiff to convict the judge below of error, and to show that he was damaged by it; Improvement Company *v.* Munson, 14 Wallace, p. 442. Powell on Appellate Proceedings, sections 105 and 112. And when it is considered that the error, if any, occurred in answering points of the defendants which should have been refused, it is to be hoped that the final decision of this case may rest with its manifest justice in its present position.

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